

CLERK'S OFFICE

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 391

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL
AND TESTAMENT OF W. FRANCIS JACOBS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1938
CERTIORARI GRANTED NOVEMBER 7, 1938

IN THE
United States Circuit Court of Appeals
For the Seventh Circuit

No. 6418

THE UNITED STATES OF AMERICA,
Appellant,

vs.

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL AND
TESTAMENT OF W. FRANCIS JACOBS, DECEASED,
Appellee.

Counsel for Appellant:

MR. JAMES W. MORRIS,
MR. SEWALL KEY,
MR. M. L. IGOE,

Counsel for Appellee:

MR. LEWIS C. MURTAUGH,

Appeal from the District Court of the United States for the Northern District
of Illinois, Eastern Division.

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1 Pleas in the District Court of the United States for Placita.
the Northern District of Illinois, Eastern Division, begun
and held at the United States Court Room, in the City of
Chicago, in said District and Division, before the Honorable
Charles E. Woodward, (District Judge of the United States
for the Northern District of Illinois on Seventeenth day of
June, in the year of our Lord one thousand nine hundred and
Thirty-Seven, being one of the days of the regular June Term
of said Court, begun Monday, the Seventh day of June, and
of our Independence the 161st year.

Present:

Honorable Charles E. Woodward, District Judge.
William H. McDonnell, U. S. Marshal.
Henry W. Freeman, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,
 Northern District of Illinois,
 Eastern Division.

Elizabeth C. Jacobs, Executrix under
 the Last Will and Testament of W.
 Francis Jacobs, deceased, }
 Plaintiff, } No. 39407.
 vs.
 The United States of America. }

Be It Remembered, that the above-entitled action was commenced by the filing of the following Petition in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 27th day of March, A. D. 1931.

Mar. 27, 11. 3 And on, to wit, the 27th day of March, A. D. 1931, came the Plaintiff by her attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

4 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * (Caption—39407) * *

PETITION.

Elizabeth C. Jacobs, as Executrix under the Last Will and Testament of W. Francis Jacobs, deceased, for cause of action against the United States of America, alleges:

1. That she is a resident of the City of Chicago, and a citizen of the State of Illinois, and that her residence is in the First Internal Revenue District of the State of Illinois.

2. That W. Francis Jacobs died testate on June 17, 1924, a citizen of the United States and a resident of the City of Chicago, in the State of Illinois, and in the First Internal Revenue District of the State of Illinois, and by the terms of the Last Will and Testament of said W. Francis Jacobs, the petitioner, Elizabeth C. Jacobs, was appointed the Executrix

thereof, and said Will was admitted to probate in the
5 Probate Court of Cook County, Illinois, said Elizabeth
C. Jacobs was appointed Executrix thereof and letters
testamentary were issued to her by said Probate Court of
Cook County, Illinois, and that said letters testamentary were
re-issued to said Elizabeth C. Jacobs on May 3, 1928, and are
now in full force and effect.

3. That on or about August 7, 1925, said Elizabeth C.
Jacobs, as Executrix as aforesaid, paid the sum of Four
Hundred Eight Dollars and Thirty-five Cents (\$408.35) to
the Collector of Internal Revenue at Chicago, Illinois, on
account of the Federal estate tax believed to be due by rea-
son of the death of said decedent, and thereafter, on or about
April 20, 1927, upon a determination of deficiency of tax
by the Commissioner of Internal Revenue, said Executrix
paid the further sum of One Thousand Four Hundred Ninety-
five Dollars and Thirty-five Cents (\$1,495.35) to the Collec-
tor of Internal Revenue at Chicago, Illinois, on account of
the Federal estate tax believed to be due by reason of the
death of said decedent.

4. That said tax was erroneously computed and over-
paid, and that the amount of such overpayment should be
refunded to the petitioner.

5. The petitioner further shows that the Commissioner
of Internal Revenue, in his final determination of the estate
tax liability arising by reason of the death of said decedent,

6 found that the gross estate of said decedent, the deduc-
tions therefrom, and the total tax due were as follows:

Petition.

"Estate of W. Francis Jacobs
MT-ET-6009-AW-1st Illinois

Date of death
—June 17, 1924

Summary.

	Returned (706)	Tentatively Determined on Review
Gross Estate:		
Real Estate	\$ 55,000.00	\$ 75,000.00
Stocks and bonds.....	26,753.39	39,910.03
Mortgages, notes, cash and insurance	25,979.94	27,730.92
Jointly owned property.....	45,000.00	79,937.50
Other miscellaneous property.....	1,640.00	1,640.00
Transfers		
Powers of appointment.....		
Property identified as previously taxed		
Total gross estate.....	154,273.33	234,268.45
Deductions:		
Funeral expenses	771.10	771.10
Administration expenses:		
Executors' commissions	3,000.00	3,000.00
Attorneys' fees	2,500.00	2,700.00
Miscellaneous	450.00	150.00
Debts of decedent.....	93.00	1,452.57
Unpaid mortgages	17,131.16	16,060.47
Net losses during settlement.....		
Support of dependents.....	8,100.00	8,100.00
Property identified as previously taxed		
Charitable, public, and similar gifts and bequests.....		
Specific exemption (resident decedents only)	50,000.00	50,000.00
Total Deductions	82,045.26	82,234.14
Net estate for tax.....	72,226.07	142,034.31
Total tax	544.46	2,340.69
Tentative Deficiency Tax.....		1,796.23
Credits for estate, inheritance, legacy or succession tax.....	136.11	585.17
Credit for gift tax.....		

Treasury Department

Internal Revenue Bureau

Estate Tax Division

Form 7321-A Revised March 1925".

7 6. The petitioner further shows that in the gross estate of said decedent there was included by the Commissioner of Internal Revenue "Jointly owned property", the total value of which was the sum of Seventy-nine Thousand Nine Hundred Thirty-seven Dollars and Fifty Cents (\$79,937.50), and that said "Jointly owned property" consisted of two tracts of land, together with the buildings and improvements thereon, the first of which was property located at 2749-59 Monticello Avenue, Chicago, Illinois, the full value of which was determined to be in the sum of Sixty Thousand Nine Hundred Thirty-seven Dollars and Fifty Cents (\$60,937.50), the second of which was property located at 1732 Humboldt Boulevard, Chicago, Illinois, the full value of which was determined to be in the sum of Nineteen Thousand Dollars (\$19,000.00).

7. The petitioner further shows that the premises at 2749-59 Monticello Avenue, Chicago, Illinois, were acquired by warranty deed dated November 23, 1917, and delivered on or about that date, a true and correct copy of which was attached to an affidavit filed in support of the claim for refund which is hereinafter set forth in this petition; that in said deed, Bergitte M. Brandt and Albert E. Brandt, her husband, were the grantors, and the said W. Francis Jacobs and Elizabeth C. Jacobs, as joint tenants, with the right of survivorship, were the grantees, and that the legal effect of said deed was to vest the title to said premises in said W. Francis

Jacobs and Elizabeth C. Jacobs, as joint tenants, with
8 the right of survivorship.

8. The petitioner further shows that the premises at 1732 Humboldt Boulevard, Chicago, Illinois, were acquired by warranty deed dated July 29, 1909, and delivered on or about that date, a true and correct copy of which was attached to an affidavit filed in support of the claim for refund which is hereinafter set forth in this petition; that in said deed, Lena De St. George was the grantor, and the said W. Francis Jacobs and Elizabeth C. Jacobs, as joint tenants, with the right of survivorship, were the grantees, and that the legal effect of said deed was to vest the title to said premises in said W. Francis Jacobs and Elizabeth C. Jacobs, as joint tenants, with the right of survivorship.

9. The petitioner further shows that on or about February 20, 1927, she filed a claim for refund of said Federal estate tax erroneously paid by her and illegally collected, and

said claim was made according to the provisions of the law in regard to claims for refund and according to the regulations of the Treasury Department established in pursuance thereof, and was, in words and figures, as follows:

"State of Illinois, }
County of Cook. } ss.

Elizabeth C. Jacobs, individually and as Executrix of the estate of W. Francis Jacobs, 1732 Humboldt Boulevard, Chicago, Illinois.

9 This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Business in which engaged: None.

Character of assessment or tax: Federal estate tax.

Amount of assessment or stamps purchased: \$1,903.70.

Amount to be refunded (or such greater amount as is legally refundable): \$1,800.00.

Dates of payment (see Collector's receipts or indorsements of canceled checks): Aug. 7, 1925, April 20, 1927.

Deponent verily believes that this application should be allowed for the following reasons:

(1) The value of the premises at 2400 W. North Avenue, Chicago, Illinois, shown as Item No. 2 of Schedule A, Form 706, heretofore filed was not in excess of \$35,000 on June 17, 1924, the date of the death of said decedent, and the increase in the valuation thereof to \$46,000 made by the Commissioner of Internal Revenue was incorrect and improper.

(2) The inclusion by the Commissioner of Internal Revenue in the gross estate of said decedent of the property at 2749-59 Monticello Avenue, Chicago, Illinois, which was jointly owned by the decedent and the deponent, and the valuation thereof in the sum of \$60,937.50 were incorrect and improper. The deponent made a substantial contribution out of her own money toward the purchase price of said premises.

(3) The inclusion by the Commissioner of Internal Revenue in the gross estate of said decedent of the property at 1732 Humboldt Boulevard, Chicago, Illinois, which was jointly owned by the decedent and the deponent, and the valuation thereof in the sum of \$19,000 were incorrect and improper. The title to this property in joint tenancy was acquired by

the decedent and the deponent by deed dated July 29, 1909, and delivered on or about August 5, 1909, and recorded in the Recorder's Office of Cook County on August 6, 1909.

(4) From the gross estate of said decedent there should be deducted the further sum of \$850, being the amount of the claim of Harry D. Knight for services rendered to the decedent in his lifetime as an attorney, which claim has been allowed in the Probate Court and paid out of the estate of said decedent since the filing of said Form 706. This appears as Item No. 4 of Schedule I, Form 706."

10 10. That thereafter, on or about April 2, 1928, pursuant to the request of the Commissioner of Internal Revenue, the petitioner filed an affidavit in support of her claim for refund, which was, in words and figures, as follows:

"State of Illinois, }
County of Cook. } ss.

The undersigned, Elizabeth C. Jacobs, being first duly sworn, deposes and says that the facts given below are true and complete:

1. That she makes this affidavit in support of the claim heretofore filed by her individually and as Executrix of the Estate of W. Francis Jacobs, MT-ET-CI-6009-CTK District of First Illinois Estate of W. Francis Jacobs, Date of death: June 17, 1924, pursuant to the suggestion of the Commissioner of Internal Revenue.

2. That the premises referred to in Paragraph 2 of said claim for refund filed by the undersigned and known as 2749-59 Monticello Avenue, Chicago, Illinois, were acquired by Warranty Deed dated November 23, 1917, from Bergitte M. Brandt and Albert E. Brandt, her husband, a true and photostatic copy of the original of said deed being attached hereto, marked "Exhibit 1".

3. That the premises referred to in Paragraph 3 of said claim for refund filed by the undersigned and known as 1732 Humboldt Boulevard, Chicago, Illinois, were acquired by Warranty Deed dated July 29, 1909, from Lena De St. George, a true and photostatic copy of the original of said deed being attached hereto, marked "Exhibit 2".

4. That the inclusion of said jointly owned property in the gross estate of W. Francis Jacobs, subject to Federal Estate Tax, is improper and not warranted by law."

11. That said claim for refund and affidavit in support

thereof, was considered by the Commissioner of Internal Revenue and the contentions of the petitioner with reference to the taxability of the "jointly owned property" were rejected by said Commissioner of Internal Revenue and disallowed on or about April 16, 1928, said letter of rejection and disallowance being as follows:

"MT-ET-C1-6009-CTK,
District of 1st Illinois,
Estate of W. Francis Jacobs.

In the claim the contention is made that certain items of real estate were overvalued. No evidence has been submitted in support of this contention although an opportunity to submit evidence was given. The values fixed by the Bureau are based upon the evidence obtained from real estate experts.

The second contention is that the decedent's wife contributed to the purchase price of Item 1 of Jointly Owned Property. Her contribution to the extent of one sixteenth was conceded. The total value of the property was found to be \$65,000.00, and in view of the wife's contribution only \$60,937.50 was included in the gross estate.

The third contention presented is that nothing should be included in the statutory gross estate on account of property held under a joint tenancy created on July 29, 1909. In subdivision (h) of Section 302 of the Revenue Act of 1924 it is provided that, 'Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act'.

The final contention is that additional deduction should be made under the caption 'Debts of decedent' in the amount of \$850.00. The net estate previously valued at \$142,034.31 is now valued at \$141,184.31, the tax on the transfer of which is \$2,323.67.

The certificate of overassessment reflects the adjustment shown above and also the correction of a duplicate assessment of deficiency."

12 12. That the Commissioner of Internal Revenue to the contrary notwithstanding, the full value of the real estate owned by said decedent in joint tenancy with his wife, the said Elizabeth C. Jacobs, at the date of his death, was not subject to Federal estate tax.

13. That Mabel O. Reinecke, formerly Collector of Internal

Revenue for the United States of America, for the First District in the State of Illinois, to whom payment of said tax was made, is no longer in office and is no longer acting as such Collector of Internal Revenue.

14. That no part of said tax so overpaid by said petitioner has been refunded or repaid by said Mabel G. Reinecke, as Collector of Internal Revenue as aforesaid, or by any other person whomsoever; that the petitioner is the sole owner of the causes of action herein set forth, and that no assignment or transfer of the same, or any part thereof, has been made, and that the petitioner is justly entitled to the amount claimed herein from the United States, after allowing all just credits and set-offs.

Wherefore, the petitioner prays that there be refunded to her the total amount of Federal estate tax paid by her, in the sum of One Thousand Nine Hundred Three Dollars and Seventy Cents (\$1,903.70), or such portion thereof as may now be legally refundable to the petitioner, together with interest thereon as required by law.

The petitioner therefore prays judgment in her favor and against the United States of America for said sum of One Thousand Nine Hundred Three Dollars and Seventy Cents (\$1,903.70) and interest, as aforesaid.

Elizabeth C. Jacobs,
*Executrix under the Last Will and
Testament of W. Francis Jacobs,
Deceased.*

State of Illinois, }
County of Cook. } ss.

Elizabeth C. Jacobs, being first duly sworn, on oath deposes and says:

That she has read the foregoing petition signed by her as Executrix under the Last Will and Testament of W. Francis Jacobs, and that the same is true.

Elizabeth C. Jacobs.

Subscribed and sworn to before me this 17 day of March,
A. D., 1931.

Charles M. Bates,
*Clerk of the District Court of the
United States, for the Northern
District of Illinois, Eastern Division.*

14 And on, to wit, the 23rd day of May, A. D. 1931, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Plea and Notice of Special Master in words and figures following, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * (Caption—39407) * *

PLEA AND NOTICE OF SPECIAL MASTER.

And the defendant, the United States of America, by George E. Q. Johnson, United States Attorney for the Northern District of Illinois, its attorney, comes and defends the wrong and injury when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it; and of this it puts itself upon the country, etc.

George E. Q. Johnson,
United States Attorney for the Northern District of Illinois.

NOTICE OF SPECIAL MASTER.

The plaintiff will take notice that on the trial of this cause the defendant will give in evidence, and insist, that of the amount of Federal estate tax sought to be recovered by the plaintiff, \$408.35 was paid on August 7, 1925; that the claim for refund of said amount was rejected on April 16, 1928; that, therefore, recovery of the said sum of \$408.35 is barred by the Statute of Limitations because this suit was not brought within two years after the rejection of the claim for abatement, nor within five years after payment of the said sum.

George E. Q. Johnson,
United States Attorney for the Northern District of Illinois.

16 And afterwards, to wit, on the 15th day of January, A. D. 1934, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge, appears the following entry, to wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—39407) • •

ORDER.

This Matter, coming on to be heard on the motion of McCulloch, McCulloch and McLaren, Attorneys for Elizabeth C. Jacobs, as Executrix under the Last Will and Testament of W. Francis Jacobs, deceased, petitioner in the above entitled cause:

It Is Ordered that leave be and it is hereby granted to said petitioner to file instantan an amendment to petition heretofore filed by her in the above entitled cause.

Enter:

William H. Holly,
Judge.

18 And on, to wit, the 15th day of January, A. D. 1934 came the Plaintiff by her attorneys and filed in the Clerk's office of said Court a certain Amendment to Petition in words and figures following, to wit:

Filed Jan. 1
1934.

19 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—39407) • •

AMENDMENT TO PETITION.

Elizabeth C. Jacobs, as Executrix under the Last Will and Testament of W. Francis Jacobs, deceased, hereby amends the Petition heretofore filed by her in the above entitled cause, by the addition of the following paragraph, to appear as Paragraph 15 of said Petition:

"15. In the event that it be determined that the Revenue Act of 1924 imposes a tax based upon the valuation of more than one-half ($\frac{1}{2}$) of the real estate enumerated above in which W. Francis Jacobs was one of the joint owners with right of survivorship at the time of his death, then said Revenue Act of 1924 is in violation of the Constitution of the United States and the Amendments thereto."

Respectfully Submitted:

Elizabeth C. Jacobs,

*Executrix under the Last Will and
Testament of W. Francis Jacobs,
deceased.*

By Hugh W. McCulloch,

Her Attorney.

20 State of Illinois } ss.
County of Cook }

Hugh W. McCulloch, being first duly sworn, on oath deposes and says that he has been duly appointed and is now acting as Attorney for Elizabeth C. Jacobs, as Executrix under the Last Will and Testament of W. Francis Jacobs, deceased, and that he has authority to make the foregoing Amendment to Petition signed by him: that he has read the foregoing and the same is true.

Hugh W. McCulloch.

Subscribed and sworn to before me this 13th day of January, A. D. 1934.

(Seal) Herman L. Taylor,
Notary Public.

Apr. 14, 1937. 21 And on, to wit, the 14th day of April, A. D. 1937 came the parties by their attorneys and filed in the Clerk's office of said Court a certain Stipulation of Facts in words and figures following, to wit:

22 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—39407) * *

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. On June 17, 1924, W. Francis Jacobs died a citizen of the United States and resident of Chicago, Illinois, leaving a last will and testament thereafter duly admitted to probate in the Probate Court of Cook County, and Elizabeth C. Jacobs was appointed executrix thereof, and letters testamentary were issued to her and that said letters testamentary were re-issued to her on May 3, 1928, and are now in full force and effect.

2. That Mabel G. Reinecke, formerly Collector of Internal

Revenue for the First District of the State of Illinois, to whom the payment of the Federal estate tax due from the estate of W. Francis Jacobs was made, is no longer in office and is no longer acting as such Collector of Internal Revenue.

3. On August 1, 1925, Elizabeth C. Jacobs, as executor of the Estate of W. Francis Jacobs, filed with the Collector of Internal Revenue for the First District of Illinois a Federal estate tax return on Form 706, which disclosed a gross estate of \$154,273.33, claimed deductions in the amount of \$82,045.26, resulting in a net estate of \$72,228.07, and a gross Federal estate tax of \$544.46. Credit on account of state inheritance tax payments was claimed in the amount of \$136.11, resulting in a net Federal estate tax of \$408.35, which amount was paid on August 1, 1925. A copy of said return is hereto attached, marked "Exhibit A", and by reference is made a part hereof.

4. Thereafter, the Commissioner of Internal Revenue made an audit and review of said estate and tentatively determined that there was a deficiency in respect of the tax in the amount of \$1,796.23. An additional credit on account of state inheritance tax payments was allowed in the amount of \$449.06, making a total credit of \$585.17, and resulting in an undischarged deficiency of \$1,347.17. The result of this audit and review by the Commissioner was fully set forth in letter dated December 23, 1926, which was mailed to the executrix of this estate. A copy of said letter of December 23, 1926 is hereto attached, marked "Exhibit B" and by reference is made a part hereof.

5. No protest was filed on behalf of the estate against the tentative findings made by the Commissioner as set forth in letter of December 23, 1926. Therefore the Commissioner of Internal Revenue made a final determination that there was an undischarged deficiency in the estate tax in the amount of \$1,347.17, and under date of March 22, 1927 mailed a letter to the executrix of this estate, advising her that the tentative findings set forth in said letter of December 23, 1926, were made final and that the undischarged deficiency in the estate tax was determined to be \$1,347.17. A copy of said letter of March 22, 1927, is hereto attached, marked "Exhibit C" and by reference is made a part hereof.

6. On April 20, 1927, the executrix paid this deficiency tax of \$1,347.17, plus interest in the amount of \$148.18, making a total payment of \$1,495.35.

7. On September 20, 1927, a claim for refund was filed by

the executrix, a copy of which is hereto attached, marked "Exhibit D" and by reference is made a part hereof. Thereafter, and on April 2, 1928, the executrix forwarded to the Commissioner of Internal Revenue an affidavit in support of her claim for refund, a copy of said affidavit is attached hereto as "Exhibit E", and by reference made a part hereof.

The claim for refund was allowed by the Commissioner in the amount of \$7.48, which amount was refunded to the executrix on May 23, 1928. The claim was rejected as to the balance. A copy of the certificate of overassessment showing the action taken by the Commissioner on this claim for refund is attached hereto, marked "Exhibit F", and by reference made a part hereof.

8. The Federal estate tax return filed by the executrix (Exhibit A) disclosed and included for tax under Schedule D (jointly owned property) as a part of the decedent's statutory gross estate the following item of property:

2749-59 Monticello Avenue, Chicago, Illinois, Encumbrance—\$17,000. Improved with three-story brick 18 flat building. Elizabeth C. Jacobs, widow of decedent, contributed \$3,000.00 toward purchase of this property. Fair market value of property at date of death—\$48,000.00; Amount to be included in gross estate—\$45,000.00.

This property was acquired by the decedent and his wife as joint tenants on November 23, 1917, and continued to be held by him and his wife as such joint tenants until the date of his death. A copy of the said conveying this property to the decedent and his wife as joint tenants is attached hereto, marked "Exhibit G," and by reference is made a part

25 hereof. Decedent's wife, Elizabeth C. Jacobs, contributed \$3,000 or one-sixteenth of the price paid toward the purchase of this property and the decedent contributed the other fifteen-sixteenths. Except for the one-sixteenth contribution aforesaid, no part of this property, and no part of the funds which were used to purchase it originally belonged to the said Elizabeth C. Jacobs.

9. In the audit of this estate tax return, the Commissioner of Internal Revenue retained as a part of this decedent's gross estate the above-described property which was owned by the decedent and his wife as joint tenants, and not as tenants in common. The Commissioner, however, increased the value of this property to \$65,000.00, and included as a part of the gross estate of this decedent the sum of \$60,937.50, this being 15/16ths of the value of the property and representing the

proportion contributed toward the purchase price by this decedent, the other 1/16th having been contributed by the wife of the decedent.

10. In the audit of this estate tax return, the Commissioner of Internal Revenue included as a part of the decedent's statutory gross estate the following property:

Lots 11 and 12, Block 1, known as 1732 Humboldt Boulevard, Chicago, Illinois.

The Commissioner determined that the value of this property was \$19,000.00 and that it was taxable at its full value. This property was acquired by the decedent and his wife, as joint tenants on July 29, 1909, and decedent and his wife continued to hold such property in joint tenancy until the date of decedent's death. A copy of the deed conveying this property to the decedent and his wife as joint tenants is attached hereto and marked "Exhibit H", and by reference is made a part hereof. No part of this property and no part of the funds which were used to purchase it originally belonged to Elizabeth C. Jacobs, the widow of the decedent, but to the contrary the funds which were used to purchase it were the individual property of the decedent.

26 11. At the time of decedent's death, there was a mortgage on the Monticello Avenue property described in paragraph 8, in the amount of \$16,060.47. In the final audit of this estate the Commissioner of Internal Revenue allowed this amount as a deduction from the gross estate of the decedent for estate tax purposes. It is stipulated and agreed that if said Monticello Avenue property should be excluded from the decedent's statutory gross estate then and in that event the deductions allowable from the adjusted gross estate should be reduced from the amount originally allowed by the Commissioner of Internal Revenue by the amount of \$16,060.47, the mortgage deduction so allowed, and any recovery by the plaintiff herein should be reduced accordingly. It is further stipulated and agreed that if any portion of said Monticello Avenue property be excluded from the decedent's statutory gross estate then and in that event a like portion of the said \$16,060.47 deduction should be disallowed, and should reduce any recovery by the plaintiff proportionately.

McCulloch, McCulloch & McLaren,
Attorneys for plaintiff.

M. L. Igoe, P.
*United States Attorney, Attorney for
Defendant.*

Treasury Department
Internal Revenue Service
Form 706—Revised December, 1924

To be Filed in Duplicate

Collection District 6009—1 Ill

Bureau File No. _____

(Stamp) Office of Internal Revenue Received Aug 8 1925
Estate Tax

(Stamp) Delinquent

Extensions of Time to File Return

Extensions by Commissioner

Time extended to _____

Time extended to _____

Time extended to _____

Extension by Collector

Time extended to _____

Collector of Internal Revenue will stamp here date return filed.

Coll. Int. Rev.
Aug-1 1925
1st Dist. of Ill.

Return for Federal Estate Tax

An Itemized Inventory by Schedule of the Gross Estate of the
Decedent, with Legal Deductions

Decedent's name W. Francis Jacobs, Deceased.

Date of death June 17, 1924.

Residence at time of death 1732 Humboldt Boulevard, Chicago, Illinois.

General Instructions—Read with Care

1. The return is required for the estate of every resident decedent the value of whose gross estate at the date of death exceeded \$50,000, and for the estate of every nonresident decedent any part of whose gross estate was, at the date of death, situated (within the meaning of the statute) in the United States. The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

2. The return is due one year after the date of death. The Return for a Resident Decedent should be filed with the collector of the district in which such decedent was domiciled at the time of death, and remittance of the tax should be made payable to "Collector of Internal Revenue at _____," naming city in which the office of the collector is located.

3. The Return for a Nonresident Decedent should be filed with the United States Collector of Internal Revenue of the district in which any part of the gross estate was situated, or, if parts of the gross estate were situated in more than one district, then with such collector as the Commissioner may designate. Remittance in payment of the tax in nonresident estates should be made payable to "Collector of Internal Revenue at _____," naming city in which the office of the collector is located.

4. Regulations No. 68, 1924 Edition, should be carefully studied before making out the return, and if the decedent died prior to 4.01 p. m., Washington, D. C. time, June 2, 1924, reference should be made to Article 109 of such regulations.

5. All papers used in preparing the return should be carefully preserved for reference or inspection. All estate tax returns are verified by an Internal Revenue officer before the tax is determined by the Bureau.

6. If the decedent was a resident and left a will, two copies thereof, one of them certified, must be filed with the return. In the case of the estate of a Nonresident, there should be filed with the return—

(a) A certified copy of the will, if decedent died testate, or of each will, if decedent left more than one to govern in different jurisdictions.

(b) A certified copy of inventory of the complete gross estate, whether situated within or without the United States, if any deductions are claimed. In such case separate schedules should be made for property within and without the United States.

(c) A certified copy of schedule of debts and expenses allowed, if deduction thereof is claimed. If certified copy of inventory of all property outside the United States is filed with the return, such property need not be entered under the respective schedules of the return. See article 52, Regulations 68, 1924 Edition.

7. This form consists of cover sheets, general information sheet and fifteen schedules. Care should be taken to see that

the return is complete and that all schedules are included in the proper order.

In the estate of a resident the various items comprising the gross estate must be set forth upon the schedules provided.

8. The questions asked under each schedule should be specifically answered, and if the decedent owned no property of any class specified under the schedule, the word "None" should be written across the schedule.

9. If there is not sufficient space for all entries under any schedule, use additional sheets of the same size, numbering them consecutively, as, for example, Schedule A-1, A-2, etc., and insert them in the proper order in the return.

10. Further instructions will be found under each schedule. If instructions are carefully observed, it will greatly assist the estate and the Bureau in the final determination of the tax liability.

11. Penalties.—For failure to file return when due, the person in default is subject to a fine not exceeding \$500, and, in addition, 25 per centum of the tax may be added. If the failure to file the return was willful the person in default is liable, in addition to all other penalties, to a fine of not more than \$10,000, or to imprisonment for not more than one year, or both. Any person required to pay the tax, keep any records, or supply any information, who willfully fails to do so, shall, in addition to other penalties, be fined not more than \$10,000, or imprisoned not more than one year, or both. Where any statement in the return is knowingly false, the person making it is subject to a penalty not exceeding \$5,000, or imprisonment not exceeding one year, or both, and for the filing of a false or fraudulent return, 50 per centum of the entire tax will be added. Any person who willfully aids or assists in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, authorized or required by the Internal Revenue laws, or procures, counsels, or advises the preparation or presentation of such return, affidavit, claim, or document, shall be guilty of a felony and upon conviction fined not more than \$10,000, or imprisoned for not more than five years, or both, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document. (See Sections 317, 1017, and 1003 of the Revenue Act of 1924.)

Estate of W. Francis Jacobs, Deceased.

District of Illinois.

General Information Sheet

The information called for on this page is necessary for purposes of record and verification. Fill out all blanks carefully and completely.

The names of the decedent's legal heirs and next of kin, or if decedent left a will, the names of the beneficiaries thereunder, are required to be stated. If there are more than ten, only the names of the ten principal ones are required.

Did decedent die testate? (Answer "Yes" or "No.") Yes
If testate, two copies, one of them certified, of the last will must be filed with the return, unless the decedent was a non-resident, in which case but one copy, certified, is required.

Permanent residence at time of death 1732 Humboldt Boulevard, Chicago, Ill.

Actual place of death Chicago, Illinois. Age at death 53

Cause of death Pneumonia

How long ill 11 days.

Business or employment Physician.

Business address 2400 West North Avenue, Chicago, Illinois.

Was decedent married or single at date of death? Married.

Widow? _____ Widower? _____

State number of children, if any Four

Heirs, Next of Kin, Devisees and Legatees

Name	Relationship	Address
Elizabeth C. Jacobs,	Widow,	1732 Humboldt Boulevard, Chicago, Illinois.
Lee V. Jacobs,	Son,	1732 Humboldt Boulevard, Chicago, Illinois.
Althea M. Jacobs,	Daughter,	1732 Humboldt Boulevard, Chicago, Illinois.
Wm. Francis Jacobs, Jr.,	Son,	1732 Humboldt Boulevard, Chicago, Illinois.
Clyde V. Jacobs,	Son,	1732 Humboldt Boulevard, Chicago, Illinois.

Names of decedent's physicians:	Address:
Dr. Frank Smithies.	1002 N. Dearborn St., Chicago, Ill.

Names of physicians and nurses who attended decedent during last illness:	Address:
Miss Behm,	St. Elizabeth's Hospital, Chicago, Ill.
Miss Lauf,	St. Elizabeth's Hospital, Chicago, Ill.

(If more space is needed, insert additional sheets of same size)

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Estate of W. Francis Jacobs, Deceased.
District of Illinois.

Gross Estate
Schedule A
Real Estate

Instructions

Article 12 of Regulations 68, 1924 Edition, should be read before preparing this schedule.

Real estate should be so described that it may be readily located. The legal description is not required unless necessary to show the exact location. The character of the buildings should be stated and the character and area of unimproved land. For location, such details as the following may be necessary:

City or Town Property.—Street and number, ward, subdivision, block and lot, etc.

Rural Property.—Township, range, block and lot, street, landmarks, etc.

If any item of real estate is subject to mortgage, the unpaid balance of the mortgage should be shown below under "Description." The full value of the property and not the equity must be extended in the value column. The mortgage should be deducted under Schedule J of this return.

The value of dower, curtesy, or a statutory estate created in lieu thereof, is taxable, and no reduction on account thereof should be made in returning the value of the real estate.

All rents accrued and unpaid should be apportioned to the date of death whether due at that time or not.

For further instructions see Articles 10 to 13, inclusive, Regulations No. 68, 1924 edition.

Did the decedent, at the time of death, own any real estate? (Answer "Yes" or "No.") Yes.

Item No.	Description	Assessed value for year of decedent's death	Fair market value at date of decedent's death	Rents accrued to date of death
1	3900 Altgeld Street, Chicago, Ill. Unincumbered and improved with a two-story and basement 8-flat brick building.....	\$ 3,712.00	\$20,000.00	
2	2400 West North Avenue, Chicago, Ill. Unincumbered and improved with a two-story brick and frame building, 4 stores, 3 flats and 1 office.....	10,250.00	35,000.00	
Totals.....			\$55,000.00	\$.....
Grand Total.....				\$55,000.00

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Schedule B

Stocks and Bonds

Instructions

Give a complete description of all securities.

Stocks.—States the number of shares, common or preferred, par value, and quotation at which returned, exact title of corporation, and, if the stock is unlisted, the location of the principal business office. If a listed security, state principal exchange upon which sold.

Examples: 10 shares American Car & Foundry Co., preferred, par \$100, at 98, New York Exchange.
10 shares Eagle Manufacturing Co., Red Bank, N. J., common, par \$25, at 30, unlisted.

Bonds.—State quantity and denomination, exact title, kind of bond, interest rate, interest and due dates. State the exchange upon which listed or the principal business office of the company, if unlisted.

Example: Ten \$1,000 Baltimore and Ohio Railway Co. first mortgage 4 per cent registered 50-year gold bonds, due 1946. January, April, July, and October, at 96, New York Exchange.

Listed stocks and bonds should be returned at the mean between the highest and lowest quoted selling price upon the date of death, or if there were no sales on day of death, then at the mean between the highest and lowest sales on the nearest date thereto, if within a reasonable period. If death occurred on a Sunday or holiday quotations of the nearest previous day should be used; if listed on several exchanges, quotations of the principal exchange should be employed.

If actual sales are not available and the stock is quoted on a bid and asked basis, the bid as of date of death should be taken.

Unlisted securities which are dealt in actively by brokers or have an active market should be returned at the sale price as of the date of death or the nearest date thereto, if within a reasonable period either before or after death. Only sales in the normal course of business should be employed. Where

no such sale occurred the nearest bid should be used, if within a reasonable period either before or after death.

Inactive stock and stock in close corporations should be valued upon the basis of the company's net worth, earning and dividend paying capacity, general market conditions, and special conditions affecting the particular company, its future prospects, and all other factors having a bearing upon the value of the stock. The financial and other data upon which the estate bases its valuation should be submitted with the return.

Securities returned as of no value, nominal value, or obsolete, should be listed last, and the address of the company and the State and date of incorporation should be stated. Correspondence or statements used as the basis for return at no value should be retained for inspection.

Interest on bonds should be apportioned to the date of death and returned in the interest column. Dividends upon stock declared prior to death, and payable after date of death, must be returned separately in the interest column unless reflected in the price at which the stock is returned.

In estates of nonresidents there should be listed in this schedule all stocks and bonds physically in the United States at date of death (as to meaning of the term "United States" see paragraph "1" on the first page of this form), and the actual depository on that date should be shown. In such estates there should also be listed in this schedule the stocks of all corporations and associations created or organized in the United States. The foregoing requirements of this paragraph should be complied with, even though an inventory of the entire gross estate wherever situated is filed with the return.

Paragraph 3 of Article 13, and Article 12, Regulations No. 68, 1924 Edition, should be carefully reviewed before preparing this schedule.

Did the decedent, at the time of death, own any stocks or bonds? (Answer "Yes" or "No.") Yes

If a resident decedent owned any stocks or bonds at the date of his death, they should be entered on pages 5 and 6. If the decedent was a nonresident there should be entered on pages 5 and 6, such stocks and bonds subject to tax as above indicated.

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Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule B—Continued

Instructions

For detailed instructions regarding the method of valuing stocks and bonds, see the preceding page.

Item No.	Description	Fair market value at day of death	Interest or dividends
Stock			
1	Certificate No. 76 for 100 shares of common stock, par value \$10.00 per share, of Minor Building Corporation, an Illinois corporation, issued to Decedent. This certificate is endorsed "Only 50% of the par value of this stock has been called for payment and has been paid. If, as and when the balance is called for payment and is paid, this certificate should be exchanged for one omitting this endorsement"	\$ 500.00	\$
2	Certificates No. 14 for 1 share and No. 15 for 15 shares of common stock, par value \$10.00 per share, of Bodi-Tone Company, Ltd., incorporated under the Ontario Companies Act, issued to decedent	180.00	.....
3	Certificates Nos. 8 for 8 shares and 14 for 24 shares of common stock, par value \$10.00 per share, of Bodi-Tone Company, an Illinois corporation, issued to decedent	320.00	.....
4	Certificates Nos. 3 for 11 shares, 5 for 5 shares, 6 for 5 shares and 9 for 4 shares of common stock, par value \$100.00 per share of W. H. Grimm Hardware Company, an Illinois corporation, issued to decedent	5,000.00	.....
5	Certificate No. 1414 for 50 shares and Nos. 1604, 1605, 1606, 1607 and 1608 for 10 shares each, and No. 2086 for 5 shares of common stock, par value \$100.00 per share, of Noel State Bank, an Illinois corporation, issued to decedent.....	20,475.00	196.89
32			
6	Certificate No. 676 for 10 shares of preferred stock, par value \$10.00 per share, of Industrial Loan & Guarantee Company, a Virginia corporation, issued to decedent	100.00	1.50

Item No.	Description	Fair mar- ket value at day of death	Interest or dividends
7	Certificate No. 116 for 2 shares of 8% cumulative preferred stock, par value \$100. per share, of American Medical Products Company, Inc., a New York corporation, issued to decedent.....	None	.....
8	Certificates Nos. 363 for 2 shares and 1081 for 8 shares of common stock of no par value of American Medical Products Company, Inc., a New York corporation, issued to decedent.....	"	.....
9	Certificates No. 8 for 5 shares of 7% preferred stock, par value \$100.00 per share, of National Industries Company, an Arizona corporation, issued to decedent .....	"	.....
10	Certificate No. 11 for 10 shares of common stock, par value \$50.00 per share, of National Industries Company, an Arizona corporation, issued to decedent .....	"	.....
11	Certificate No. 1851 for 200 shares of common stock, par value \$1.00 per share, of San Pedro-Point Fermin Oil & Gas Co., a California corporation, issued to decedent .....	"	.....
12	Certificates Nos. 245 for 1425 shares and 309 for 100 shares of common stock, of no par value, of Pitney-Bowes Postage Meter Co., a Delaware corporation, issued to decedent.....	"	.....
33			
13	Certificates Nos. 610 for 100 shares, 759 for 5000 shares, 760 for 5000 shares, 761 for 5000 shares, 762 for 5000 shares, 763 for 4000 shares, 764 for 650 shares, 1185 for 100 shares, 1267 for 1000 shares, 1344 for 2000 shares and 1349 for 600 shares, of common stock, par value \$1.00 per share, of Harmony Mines Company, a Nevada corporation, issued to decedent	None	.....
14	Certificate No. 981 for 1000 shares of common stock, par value \$1.00 per share, of the Arstad Oil, a Montana corporation, issued to decedent.....	"	.....
15	Certificate No. 7608 for 83-5/10 shares of common stock, Class A, par value \$10.00 per share, of Lewis Oil Corporation, a Delaware corporation, issued to decedent .....	"	.....
16	Certificates Nos. 1138 for 3000 shares, 1160 for 2000 shares and 1169 for 1500 shares of common stock, par value \$1.00 per share, of Blue Bell Mining Company, Ltd., an Idaho corporation, issued to decedent .....	"	.....
17	Certificates Nos. 3493 for 100 shares and 3623 for 100 shares of common stock, par value \$.50 per share, of Jerome Superior Copper Company, an Arizona corporation, issued to decedent.....	"

Exhibit A.

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Item No.	Description	Fair market value at day of death	Interest or dividends
18	Certificates Nos. 5938 for 4 shares, 12481 for 1 share, 15000 for 1 share, 16355 for 50 shares, 17365 for 1 share, 19069 for 1 share, 21111 for 1 share, 22804 for 1 share, 30289 for 33 shares and 30727 for 1 share of preferred stock, par value \$10.00 per share, of Dennon Products Company, an Arizona corporation, issued to decedent.....	"	.....
34			
19	Certificates Nos. 317 for 10 shares and 1838 for 30/100 share of common stock, par value \$10.00 per share, of Lafayette Building Corporation, an Illinois corporation, issued to decedent.....	None	.....
20	Certificate No. 255 for 40/100 share of preferred stock, par value \$100.00 per share, of Union Bond & Mortgage Co., a Delaware corporation, issued to decedent .....	"	.....
21	Certificates Nos. 801 for 1900 shares, 2014 for 500 shares and 2142 for 2500 shares of common stock, par value \$1.00 per share, of The Wasatch-Colorado Mining Company, a South Dakota corporation, issued to decedent.....	"	.....
22	Certificates Nos. 310 for 342 shares and 996 for 50 shares of preferred stock, par value \$1.00 per share, of The Wasatch-Colorado Mining Company, a South Dakota corporation, issued to decedent....	"	.....
23	Certificate of interest No. 196 for 20 units (20/1000 interest) in Tick Canyon Oil Syndicate, an unincorporated association of Los Angeles, California, issued to decedent.....	"	.....
24	Certificate of interest Nos. 24 for 2 units, 204 for 8 units, 328 for 15 units, 360 for 7 units, 374 for 3 units, 395 for 5 units, 527 for 5 units, 611 for 2 units and 691 for 3 units (100/1000 interest) in Tick Canyon Oil Syndicate, an unincorporated association of Los Angeles, California.....	"
Totals		\$26,555.00	\$ 198.39
Grand Total.....			\$26,753.39

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Estate of W. Francis Jacobs, Dec'd.

District of Illinois.

Schedule C

Mortgages, Notes, Cash, and Insurance

Instructions

Article 12 of Regulations 68, 1924 Edition, should be read before preparing this schedule.

The four classes of property on this schedule should be listed separately in the order given.

Mortgages.—State (1) face value and unpaid balance, (2) date of mortgage, (3) name of maker, (4) property mortgaged, (5) interest dates and rate of interest, and (6) amount of unpaid interest. For example: Bond and mortgage for \$5,000, unpaid balance \$4,000; dated January 1, 1923, John Doe to Richard Roe; premises 22 Clinton St., Newark, N. J.; interest payable at 6 per cent per annum January 1 and July 1; interest paid to January 1, 1924; unpaid interest \$30.

Notes, Promissory.—Give similar data.

Cash in Possession.—List separately from bank deposits.

Cash in Bank.—Name bank and address, amount in each bank, serial number and nature of account, stating whether checking, savings, time deposit, etc. Include accrued interest in income column, or indicate if included in total on deposit. If statements are obtained from banks they should be retained for inspection by an internal-revenue agent.

Insurance.—The proceeds of all life insurance to whomsoever payable must be returned regardless of value. Insurance payable to the estate must be returned first. State (1) name of company, (2) number of policy, (3) name of beneficiary. Include full amount received.

Important.—If there is insurance payable to beneficiaries other than the estate, deduction may be taken at bottom of this page equal to the amount returned for such insurance, but not exceeding \$40,000.

If decedent was a nonresident, and died subsequent to 3.55 p. m. November 23, 1921, Washington, D. C., time, insurance on his life need not be included as a part of his gross estate. Neither should bank accounts situated in this country be included where the nonresident decedent died subsequent to said

date unless decedent was doing business in the United States. All facts concerning such an account should be reported where it is contended that the account is not taxable.

For further instructions see articles 25 to 28, inclusive, Regulations No. 68, 1924 Edition.

(1) Did the decedent, at the time of his death, own any mortgages, notes, or cash? (Answer "Yes" or "No.") Yes

(2) Was any insurance on life of decedent receivable by his estate? (Answer "Yes" or "No.") No

(3) Was any insurance on life of decedent receivable by beneficiaries other than the estate? (Answer "Yes" or "No.") Yes

Item No.	Description	Fair market value at day of death	Income or interest accrued to date of death
1	Note from Walter H. Grimm, payable to Decedent, dated January 1, 1921, for \$4,900.00, due 5 years after date, with interest at 6% after January 1, 1921. Credits: Interest paid to January 1, 1922. Interest from January 1, 1922 unpaid.....	\$ 4,900.00	\$ 1,009.60
2	Note of W. H. Grimm Hardware Company, payable to decedent, dated January 2, 1924, for \$17,000.00, due one year after date with interest at 7% per annum. No credits. Interest from date of note unpaid	17,000.00	545.38
3	Note from Alfred Mathisen, payable to decedent, dated May 28, 1924, for \$275.00, due one year after date. No credits. Note bears no interest.....	275.00	.....
36			
4	From Christ Boyschau, payable to Decedent, dated February 14, 1924, for \$500.00, due one year after date, with interest at 6% per annum. No credits. Interest from date of note unpaid.....	500.00	15.00
5	Note from Harmony Mines Company, payable to decedent, dated April 19, 1923, \$1000.00, due one year after date with interest at 7% per annum, payable semi-annually. No credits. Interest coupons for \$35.00 each, due respectively October 19, 1923 and October 19, 1924, unpaid.....	None	.....
6	Note from Harmony Mines Company, payable to decedent, dated July 1, 1923, \$500.00, due one year after date, interest at 7% per annum, payable semi-annually. Interest coupons for \$17.50 each, due respectively January 1, 1924 and July 1, 1924, unpaid .....	"	.....
7	Note from Edward H. Jacobs, payable to decedent, dated January 2, 1924, for \$7,825.36, due January 1, 1925, with interest at 6%. No credits. Interest from date of note unpaid.....	"	.....

Exhibit A.

Item No.	Description	Fair market value at day of death	Income or interest accrued to date of death
8	Note from J. E. Jacobs, payable to decedent, dated January 1, 1924, \$2,862.00, due one year after date, interest at 6% per annum. No credits. Interest from date of note unpaid.....	"	_____
9	Note from J. E. Jacobs, payable to decedent, dated February 26, 1924, \$300.00, due on demand, with interest at 6% per annum. No credits. Interest from date of note unpaid.....	"	_____
37			
10	Note from Dr. A. F. McKenzie, payable to decedent, for \$3,400.00, due May 30, 1919.....	None	_____
11	Note from Dr. A. F. McKenzie, payable to decedent, for \$7,700.00, due February 4, 1925.....	"	_____
12	Cash on hand at time of decease.....	975.00	_____
13	Northwestern Mutual Life Insurance Co. payable to Elizabeth C. Jacobs, wife.....	10,000.00	_____
14	Prudential Life Insurance Co., policy #141970, payable to Elizabeth C. Jacobs, wife, Lee V. Jacobs, Althea M. Jacobs, William F. Jacobs, Jr., and Clyde Jacobs, children	2,391.93	74.58
15	Metropolitan Life Insurance Co. payable to Elizabeth C. Jacobs, wife.....	1,000.00	_____
16	Royal Leag Benefit, payable to Elizabeth C. Jacobs, wife	1,000.00	_____
17	Catholic Order of Foresters, payable to Elizabeth C. Jacobs, wife.....	1,000.00	_____
18	The Maccabees Benefit, payable to Elizabeth C. Jacobs, wife	1,000.00	_____
19	Prudential Life Ins. Co., Policy #2907901, payable to Lee V., Althea M., William F. Jr. and Clyde Jacobs, children	20,000.00	685.38
	Total	\$60,041.93	
	Less amount of insurance receivable by beneficiaries, other than the estate, not in excess of \$40,000.00.....	38,391.93	
	Total	23,650.00	2,329.94
	Grand Total.....		\$25,979.94

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Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule D-1

Jointly Owned Property

Instructions

Article 12 of Regulations 68, 1924 Edition, should be read before preparing this schedule.

All property of whatever kind or character, whether real estate, personal property, bank accounts, etc., in which the decedent held at the time of his death an interest either as a joint tenant or as a tenant by the entirety, must be returned under this schedule.

The full value of the property must be included in the fourth column, unless it can be shown that a part of the property originally belonged to the other tenant or tenants and was never received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth. (See section 302 (e) of act approved June 2, 1924, and articles 22 and 23, Regulations No. 68, 1924 Edition.)

Where it is shown that the property or any part thereof, or any part of the consideration with which the property was purchased, was acquired by the other tenant or tenants from the decedent for less than a fair consideration in money or money's worth, there should be omitted from this schedule only so much of the value of the property as is proportionate to the consideration furnished by such other tenant or tenants.

Where the property was acquired by gift, bequest, devise, or inheritance by the decedent and spouse as tenants by the entirety, then only one-half of the value of the property should be listed on this schedule. Where the property was acquired by the decedent and another person or persons by gift, bequest, devise, or inheritance as joint tenants, and their interests are not otherwise specified or fixed by law, then there should be entered on this schedule only such fractional part of the value of the property as is obtained by dividing the full value of the property by the number of joint tenants.

If the executor contends that less than the value of the entire property is includable in the gross estate for purposes

Exhibit A.

of the tax, the burden is upon him to show his right to include such lesser value, and in such case he should make proof of the extent, origin, and nature of the decedent's interest and the interest of decedent's cotenant or cotenants.

If the property consists of real estate, the assessed value thereof for the year of death should be shown in the second column, headed "Description of property." In the third column should be entered the fair market value of the whole property, even though only a fractional part thereof is returnable in column 4. In the fourth column should be entered the amount to be included in the gross estate pursuant to the instructions given above. In the fifth column should be entered the rents, interest, and other income accrued to the date of decedent's death in the same proportion as the amount entered in column 4 bears to the amount entered in column 3.

Property in which the decedent held an interest as a tenant in common should not be listed here, but the value of his interest therein should be returned under Schedule A, if real estate, or if personal property, under the appropriate schedule. The value of the decedent's interest in partnerships should not be included here, but under Schedule D-2, on the following page, designated as "Other Miscellaneous Property."

Item No.	Description of property	Fair market value of the property at date of decedent's death	Amount to be included in gross estate	Rents and other income accrued to date of death
1	2749-59 Monticello Avenue, Chicago, Illinois. Encumbrance \$17,000.00. Improved with three-story brick 18 flat building. Assessed valuation \$8,900.00. Acquired fall 1916. Elizabeth C. Jacobs, widow of decedent, contributed \$3000.00 toward purchase of this property.....	\$48,000.00	\$45,000.00	\$.....
	Totals		\$45,000.00	\$.....
	Grand Total			\$45,000.00

(If more space is needed, insert additional sheets of same size)

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Estate of W. FRANCIS JACOBS, Deceased.

District of Illinois.

Schedule D-2

Other Miscellaneous Property

Instructions

Article 12 of Regulations 68, 1924 Edition, should be read before preparing this schedule.

Under this schedule include all items of gross estate not returned under another schedule, including the following: Debts due the decedent; interests in business; claims, rights, royalties, pensions; leaseholds, judgments, shares in trust funds or in estates of decedents who died more than five years prior to the present decedent's death, or in estates of decedents who died within five years prior to the present decedent's death where the share therein is not reported on schedule G, or on another schedule of this return; household goods and personal effects, including wearing apparel; farm products and growing crops; livestock, farm machinery, automobiles, etc.

When an interest in a copartnership or unincorporated business is returned, submit in duplicate statement of assets and liabilities as of date of death and for the five years preceding death, and statement of the net earnings for the same five years. Good will must be accounted for. In general, the same information should be furnished and the same methods followed as in valuing close corporations.

In listing automobiles give make, model, year, and condition as of date of decedent's death.

Did the decedent, at the time of his death, own any interest in a copartnership or unincorporated business? (Answer "Yes" or "No.") No.

Did the decedent, at the time of his death, own any miscellaneous property not returnable under any other schedule? (Answer "Yes" or "No.") Yes.

Item No.	Description	Fair market value at day of death	Interest and other income accrued to date of death
1	One stop watch.....	\$ 20.00	\$.....
2	Three suits of clothes.....	45.00	.....
3	One set physician's instruments.....	100.00	.....
4	One Stearns-Knight automobile, touring, 1917, bad.	100.00	.....
5	One Franklin Automobile, Sedan, 1923, fair.....	1,375.00	.....
Totals		\$1,540.00	\$.....
Grand Total			\$1,540.00

(If more space is needed, insert additional sheets of same size)

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Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule E

Transfers

Instructions

Article 12 of Regulations 68, 1924 Edition, should be read before preparing this schedule.

All gifts and transfers, including trusts, made or created by the decedent, regardless of the date thereof, in contemplation of or intended to take effect in possession or enjoyment at or after death, other than by bona fide sales for a fair consideration in money or money's worth, are subject to the tax and must be returned under this schedule and the value of the property entered in the fourth column.

All transfers made by the decedent within two years of his death, other than bona fide sales for a fair consideration in money or money's worth, are deemed to have been made in contemplation of death if of a material part of the decedent's property, and the value of the property must be entered in the third column and must also be extended into the fourth column for inclusion in the gross estate unless the executor has clear evidence to show that the transfers in question were not in fact made in contemplation of death, and such evidence accompanies the return.

The executor is required to report any transfer of an amount or value of \$1,000 or more made by the decedent within two years of his death, and not constituting a bona fide sale for a fair consideration in money or money's worth.

All transfers of a material part of the decedent's estate made more than two years prior to death must be listed in this schedule, but the value need not be extended into the fourth column if the executor contends that the transfers were not made in contemplation of death.

In all cases where a transfer of a material part of the decedent's property, made within two years of death, is listed in this schedule, but the value not extended into the fourth column for inclusion in the gross estate, the executor is required to submit as a part of the return documentary evidence in the form of affidavits fully setting forth all the facts and circumstances indicating the intent of the decedent in making the transfer, and also one certified copy of death certificate.

All property transferred, by the decedent during his lifetime, except bona fide sales for a fair consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through the exercise of a power to alter, amend, or revoke, either by the decedent alone or in conjunction with any person. Where property was so transferred and the decedent, in contemplation of death, relinquished the power to alter, amend, or revoke the transfer, the transfer is subject to tax, and the value of the property must be included in columns 3 and 4 of this schedule.

Where the transfer was effected by an instrument in writing, two copies of such instrument should be filed with the return, one copy of which must be certified or verified, unless the decedent was a nonresident, in which case but one copy, certified or verified, need be filed.

The name of transferee, date and form of transfer, description of property, and fair market value at time of death should be set forth in this schedule. For further instructions see articles 15 to 21, inclusive, Regulations No. 68, 1924 Edition.

(1) Did the decedent, at any time during his life, make any transfer in contemplation of or intended to take effect in possession or enjoyment at or after his death, other than by bona fide sale for a fair consideration in money or money's worth? (Answer "Yes" or "No.") No.

(2) Did the decedent, within two years immediately preceding his death, make any transfer of a material part of his

property without a fair consideration in money or money's worth? (Answer "Yes" or "No.") No.

(3) Did the decedent, within two years immediately preceding his death, make any transfer of an amount or value equal to or exceeding \$1,000 without a fair consideration in money or money's worth? (Answer "Yes" or "No.") No.

(4) Did the decedent, at any time, make a transfer of a material part of his property without a fair consideration in money or money's worth, but not believed to have been in contemplation of death or intended to take effect in possession or enjoyment at or after his death? (Answer "Yes" or "No.") No.

(5) If the answer to question (4) is "Yes," state date, amount or value, and motive which actuated the decedent in making the transfer or transfers:

None

(6) Did the decedent, at the time of his death, possess the right (either alone or in conjunction with any person), to change through the exercise of a power to alter, amend, or revoke the enjoyment of any property previously transferred by him? (Answer "Yes" or "No.") No.

(7) Did the decedent, at any time during his life, relinquish in contemplation of his death the power to alter, amend, or revoke any transfer previously made by him? (Answer "Yes" or "No.") No.

(8) If the answer to either questions (6) or (7), or both of them, is "Yes," the value of the property transferred must be entered in column 4 for inclusion in the gross estate.

(9) Were there in existence at the time of the decedent's death any trusts created by him during his lifetime? (Answer "Yes" or "No.") No.

Item No.	Description of property transferred, and details of transfer	Fair market value at day of death	Fair market value to be included in gross estate	Rents or other income accrued to day of death
	None	\$.....	\$.....	\$.....
Totals			\$.....	\$.....
Grand Total			\$.....	\$.....
Amounts Carried Forward.....			\$.....	\$.....

(Continued on following page)

41 Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule E—Continued

For Instructions—See Page 10

Item No.	Description of property transferred and details of transfer	Fair market value at day of death	Fair market value to be included in gross estate	Rents and other income accrued to day of death
	Amounts brought forward.....	\$.....	\$.....	\$.....
		\$.....		
	Totals	\$	None	\$ None
	Grand Total!	\$		None

(If more space is needed, insert additional sheets of same size)

42 Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule F

Powers of Appointment

Instructions

Article 12 of Regulations 68, 1924 Edition, should be read before preparing this schedule.

Property passing under a general power of appointment exercised in the decedent's will must be returned. If the decedent exercised a general power by deed, the value of the property must be included in the gross estate if the deed was made in contemplation of death or intended to take effect in possession or enjoyment at or after death, except where executed for a fair consideration in money or money's worth.

Duplicate copies of the will or deed conferring the power upon the decedent, and of the instrument by which the power was exercised, must be filed with the return, and one copy of

such will, deed and instrument must be duly certified or verified, unless the decedent was a nonresident, in which case but one copy of each of the documents referred to, certified or verified, need be filed. This should be done even though it is contended that the power was a limited one and the property passing thereunder is not returned as taxable.

Property passing under the exercise of a power of appointment should not be listed under any other schedule.

For further instructions see Article 24, Regulation No. 68, 1924 Edition.

(1) Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general power of appointment? (Answer "Yes" or "No.") No.

(2) Did the decedent, at any time, by will or otherwise, exercise a limited power of appointment? (Answer "Yes" or "No.") No.

Item No.	Description and details	Fair market value at day of death	Rents and other income accrued to day of death
	None	\$ None	\$ None
Totals		\$ None	\$ None
Grand Total		\$ None	\$ None

(If more space is needed, insert additional sheets of same size)

43 Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule G

Property Identified as Previously Taxed

Instructions

Before executing this schedule read carefully articles 41 to 43, inclusive, and 53, Regulations 68, 1924 Edition. (If the present decedent's death occurred prior to the passage of the Revenue Act of 1924, articles 44 to 46 and article 56 of Reg-

ulations 63, 1922 Edition, as amended by article 109 of Regulations 68, 1924 Edition, control, and should be carefully read and Form 706, revised in November, 1923, should be used.)

Property identified as received from a donor or a prior decedent within five years prior to the present decedent's death or acquired in exchange for such property, must be included in this schedule at the value at the date of the present decedent's death whether greater or less than the value as included in the donor's gift tax return, or in the return for the prior decedent, and deduction taken under Schedule K. The deduction is limited to the identical property received or property identified as acquired by first exchange of such property. No deduction is permitted for property acquired by a second or subsequent exchange.

Where property identified as acquired by first exchange is returned, it must be listed in such manner as to indicate that fact and to show the original property received from the donor or the prior decedent.

If property is acquired by exchange, the full value thereof at the date of the present decedent's death must be entered in this schedule and carried forward to the recapitulation of the gross estate, even though the present decedent gave additional valuable consideration over and above the value of the property given in the exchange.

Unless property can be clearly identified and the full tax due from the donor or prior estate has been paid, the deduction can not be taken. The burden of proof rests upon the person claiming the deduction.

Where properties listed on this schedule were received from more than one donor or prior decedent, set out separately the property received from each, and give with respect to each donor or prior decedent the information called for immediately below.

Donor or Prior Decedent

Name of donor or prior decedent.....
(Strike out words not applicable)

If a decedent, show date of death, or if a donor, show calendar year in which gift to this decedent was made.....

Residence of donor at time of gift, or of decedent at time of death

Name and address of administrator or executor of prior decedent _____

Return was filed with Collector at _____

Item No.	Description	Fair market value at day of present decedent's death	Rents and other income accrued to day of present decedent's death	
	None	\$ None	\$	None
Totals		\$ None	\$	None
Grand Total to be Included in the Gross Estate.....			\$	None

(If more space is needed, insert additional sheets of same size)

44

Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Deductions

Schedule H

Funeral and Administration Expenses

Instructions

Funeral expenses and administration expenses should be itemized, giving names and addresses of persons to whom payable, and exact nature of the particular expense. Preserve all vouchers and receipts for inspection by an internal revenue agent.

No deduction may be taken upon the basis of a vague or uncertain estimate.

Executors' or administrators' commissions should be entered in such amount as has actually been paid, or which it is reasonably expected will be paid, not to exceed the amount allowable by the laws of the jurisdiction wherein the estate is administered, and not in excess of the amount usually allowed in cases similar to that of this estate. Where the commissions have not been awarded by the court, their deduction on final audit is discretionary with the Commissioner, subject to future adjustment.

Attorneys' fees should be deducted in the amount paid, or

to be paid. If the fees have not been paid at the time of the final audit, their deduction is discretionary with the Commissioner, subject to future adjustment.

Estate, legacy, succession, and inheritance taxes, and taxes on income received after death, are not deductible. Credit to a limited extent may be taken for estate, legacy, succession, inheritance and gift taxes, provided the conditions named in article 9 of Regulations 68, 1924 Edition, are fully met.

For further instructions see Articles 9, 29 to 35, inclusive, and 52, Regulations No. 68, 1924 Edition.

Item No.	Amount of Item	Totals
Funeral expenses:		
1 Joseph Schneider, Undertaker, 6110 Cottage Grove Avenue, Chicago, Illinois, for burial of decedent...	\$ 731.10	\$.....
Ref. T. F. Quinn, Saint Sylvester's Church, Chicago, Illinois, for officiation at funeral.....	40.00	_____
Total Funeral Expenses.....		\$ 771.10
Executor's commission, estimated.....	\$3,000.00	
Attorney's fee, estimated.....	\$2,500.00	
Miscellaneous administration expenses:		
Clerk of Probate Court, Cook Co., Ill. (Est.)....	150.00	
Personal property taxes 1925, based on an assessment by Board of Assessors at \$6,000.00.....	300.00	
Total Administration Expenses.....	\$5,950.00	\$5,950.00
Grand Total		\$6,721.10

(If more space is needed, insert additional sheets of same size)

45

Estate of W. Francis Jacobs, Dec'd.

District of Illinois.

Schedule I

Debts of Decedent

Instructions

Itemize fully below all valid debts of the decedent owing by him at the time of death.

If deduction is claimed for a debt, the amount of which is disputed or the subject of litigation, only such amount may be deducted as the estate concedes to be a valid claim. If the claim is contested, that fact should be stated.

Exhibit A.

Enter in this schedule notes unsecured by mortgage and give full details, including name of payee, face and unpaid balance, date and term of note, interest rate and date to which interest was paid prior to death.

Care must be taken to state the exact nature of the claim as well as the name of the creditor. If the claim is for services rendered over a period of time, state the period covered by the claim. Example: Edison Electric Illuminating Company for electric service during December, 1923, \$25.

All Vouchers or Original Records should be preserved for inspection by an internal revenue agent.

For further instructions see Articles 29, 30, 36, 37, and 52, Regulations No. 68, 1924 Edition.

Item No.	Credit/or and nature of claim	Amount
1	Alfred Mathison, for furniture repairs.....	\$ 33.00
2	Miss Behm for nursing services during last illness.....	30.00
3	Miss Lauf for nursing services during last illness.....	30.00
4	Harry D. Knight, claim filed in Probate Court of Cook County, Illinois, for \$3,453.00. This claim is disputed, the subject of litigation and is being contested. Claim for deduction is reserved.	
Total.....		\$ 93.00

(If more space is needed, insert additional sheets of same size)

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Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule J

Mortgages, Net Losses, and Support of Dependents

Instructions

Mortgages.—Give location of property, name of mortgagee, date and term of mortgage, face amount, unpaid balance, rate of interest, date to which interest was paid prior to death. Identify by item number, as listed in Schedule A, the property securing each mortgage. Enter in fourth column accrued interest accrued to date of death. Mortgages upon, or any indebtedness in respect to, property included in the gross estate is deductible only to the extent that the liability for the mortgage or indebtedness was incurred or contracted bona fide and for a fair consideration in money or money's worth. Unsecured notes should be listed on Schedule I.

Losses.—Losses are strictly limited to those arising from fire, storm, shipwreck, or other casualty, or from theft, to the extent that such losses are not compensated for by insurance or otherwise. Losses must occur during the settlement of the estate. Depreciation in the value of securities or other property does not constitute a deductible loss. In listing losses, full particulars must be given not only as to the loss sustained, but the cause thereof, and in the case of death of livestock, the cause of death must be stated, if known. If insurance or other compensation was received on account of loss, state the amount collected.

Support of Dependents.—No deduction may be taken for support of dependents unless the local law permits the allowance, the local court has made a decree specifying the amount thereof, and in fact the allowance was reasonably required for the support of the person in question during the settlement of the estate, and actual disbursement was made from the assets of the estate to the dependents.

For further instructions see Articles 38, 39, 40, and 52, Regulations No. 68, 1924 Edition.

Item No.	Mortgages	Unpaid amount at day of decedent's death	Interest accrued to day of death
1	2749-59 Monticello Avenue, Chicago, Illinois, Joseph R. Noel, Trustee, \$17,000.00, unpaid balance \$17,000.00, 6%, interest paid to May 1, 1924. Dated November 1, 1920, due five years after date	\$17,000.00	\$ 131.16
	Totals	\$17,000.00	\$ 131.16
	Grand Total		\$17,131.16
(If more space is needed, insert additional sheets of same size)			

Item No.	Losses during administration	Amount
	None	\$ None
	Total	\$ None
(If more space is needed, insert additional sheets of same size)		

Item No.	Support of dependents	Amount
1	Widow's and children's award, appraised and approved by the Probate Court of Cook County, Illinois, October 24, 1924	\$8,100.00
	Total	\$8,100.00
(If more space is needed, insert additional sheets of same size)		

47 Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule K-1

Deduction of Property Identified as Previously Taxed

(See Schedule K-2 for Deduction of Charitable, Public, and
Similar Gifts and Bequests)

Instructions

Note.—If the present decedent died prior to the passage of the Revenue Act of 1924, Articles 44 et seq. and 56 of Regulations No. 63, 1922 Edition, as amended by Article 109 of Regulations 68, 1924 Edition, control, and should be carefully read, and Form 706, as revised in November, 1923, should be used.

Enter in this schedule the amount deductible as representing property received from a donor within five years next preceding the present decedent's death, or from a prior decedent who died within five years of the death of the present decedent, or property acquired in exchange for property so received. If property received from more than one donor or prior decedent is listed in this schedule, that received from each should be set out separately.

Where the present decedent exchanged property which had been so received by him, and additional valuable consideration was given by him in such exchange, there may be deducted in this schedule such proportion only of the value, at the date of his death, of the property so acquired by the present decedent in such exchange as the value of the property received by him from such donor or prior decedent, and parted with by him in the exchange, bore to the entire consideration given. For example: An item of property received from a donor or a prior decedent, which had a value of \$10,000, was exchanged for property valued at \$15,000, and an additional \$5,000 consideration was given by the present decedent. The full value at date of the present decedent's death of the property acquired in exchange should be listed under Schedule G and two-thirds of such value deducted under

this schedule. The \$10,000 and \$15,000 values referred to in this example relate to the values as of the date of the exchange.

The amount deductible in this schedule may not exceed either (1) the value of the property received by the present decedent from a donor or prior decedent, as that value was fixed by the Commissioner in determining the gift tax of such donor or the estate tax of the estate of such prior decedent, or (2) the fair market value of such property at date of present decedent's death.

Where any property received by the present decedent from a donor or prior decedent, or property acquired in exchange therefor, is used in the discharge of funeral or administration expenses, debts of the decedent, mortgages, support of dependents, or any bequest or devise for a public or charitable purpose, or is lost during the settlement of the present decedent's estate as the result of fire, storm, shipwreck, other casualty, or by theft, and deduction on account thereof is taken in Schedules H, I, J, and K-2, the deduction in this schedule must be correspondingly reduced.

For further instructions, see Articles 41, 42, 43, and 53 of Regulations No. 68, 1924 Edition.

Item No.	Description of property	Amount previously taxed	Amount to be deducted
	None	\$ None	\$ None
Totals.....		\$.....	

(If more space is needed, insert additional sheets of same size)

Estate of W. Francis Jacobs, Deceased.

District of Illinois.

Schedule K-2

Charitable, Public, and Similar Gifts and Bequests

Instructions

Note.—If the decedent died between December 31, 1917, and the date of the passage of the Revenue Act of 1924, Articles 47 et seq., and 57, Regulations 63, 1922 Edition, control, and should be read carefully before preparing this schedule.

When a deduction is claimed under this schedule, there must be submitted with the return: (1) Two copies of the will, one of which should be certified, or two copies of the instrument of gift, one of which should be certified or verified. Where decedent was a nonresident, but one copy of the document, certified or verified, need be furnished; (2) an affidavit of the executor showing whether the decedent's will has been, or to the best of his knowledge, information and belief will be, contested.

For further instructions see Articles 44 to 47, inclusive, and 54, Regulations No. 68, 1924 Edition.

Item No.	Name and address of beneficiary	Character of institution	Amount
	None	None	\$ None
Total.....			\$ None

(If more space is needed, insert additional sheets of same size)

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Schedule L

Recapitulation

Sched- ule	Gross estate	Value
A	Real estate	\$ 55,000.00
B	Stocks and bonds (grand total of all pages of this schedule)	26,753.39
C	Mortgages, notes, cash and insurance	25,979.94
D-1	Jointly owned property	45,000.00
D-2	Other miscellaneous property	1,540.00
E	Transfers	-----
F	Powers of appointment	-----
G	Property identified as previously taxed	-----
	Total Gross Estate	\$154,273.33

Sched- ule	Deductions	Amount
H	Funeral expenses	\$ 771.10
	Administration expenses:	
	Executors' commissions	3,000.00
	Attorneys' fees	2,500.00
	Miscellaneous	450.00
I	Debts of decedent	93.00
J	Unpaid mortgages	17,131.16
	Net losses during administration	8,100.00
	Support of dependents	-----
K-1	Property identified as previously taxed	-----
K-2	Charitable, public, and similar gifts and bequests	-----
	Specific exemption (resident decedents only)	*50,000.00
	Total Deductions	\$ 82,045.26
	Total gross estate	\$154,273.33
	Total deductions	82,045.26
	Net Estate for Tax	\$ 72,228.07

For recapitulation of gross estate, deductions and net estate for nonresident decedents, see Schedule M.

Schedule M

Deductions—Estate of Nonresident

If the decedent was not a resident of the United States, Hawaii or Alaska, no deductions whatever are allowable unless the value of that part of his gross estate situated outside of the United States, Hawaii and Alaska be set forth. If it be desired to claim deductions, execute Schedules H-I-J-K and compute the deductions allowable as follows:

1. Value of gross estate in United States (Schedules A-B-C-D-E-F-G)	\$
2. Value of gross estate outside of the United States (attach itemized schedule showing values) .....	.....
3. Value of total gross estate wherever situated (1 plus 2) .....	.....
4. Gross deductions under Schedules H-I-J .....	.....
5. Net deductions under Schedules H-I-J (that proportion of 4 that 1 bears to 3, not exceeding 10% of 1) .....	.....
6. Schedule K (within the United States) .....	.....
7. Total deductions allowable (5 plus 6) .....	.....
8. Net estate taxable (1 minus 7) .....	.....

Rates and Tax Due

			Date of Death.....					Amount of Tax
			(1)*	(2)*	(3)*	(4)*	(5)*	
			Sept. 9, 1916, to Mar. 2, 1917, inclusive	Mar. 3, 1917, to Oct. 3, 1917, inclusive	Oct. 4, 1917, to Feb. 24, 1919, inclusive	Feb. 25, 1919, to June 2, 1924, inclusive	On and after June 3, 1924	
Ex-ceeding—	Net Estate Not ex-ceeding—	Amount of block	Rate per cent	Rate per cent	Rate per cent	Rate per cent	Rate per cent	
	\$50,000	\$50,000	1	1½	2	1	1	\$ 500.00
\$50,000	100,000	50,000	2	3	4	2	2	44.46
100,000	150,000	50,000	2	3	4	2	3	-----
150,000	250,000	100,000	3	4½	6	3	4	-----
250,000	450,000	200,000	4	6	8	4	6	-----
450,000	750,000	300,000	5	7½	10	6	9	-----
750,000	1,000,000	250,000	5	7½	10	8	12	-----
1,000,000	1,500,000	500,000	6	9	12	10	15	-----
1,500,000	2,000,000	500,000	6	9	12	12	18	-----
2,000,000	3,000,000	1,000,000	7	10½	14	14	21	-----
3,000,000	4,000,000	1,000,000	8	12	16	16	24	-----
4,000,000	5,000,000	1,000,000	9	13½	18	18	27	-----
5,000,000	8,000,000	3,000,000	10	15	20	20	30	-----
8,000,000	10,000,000	2,000,000	10	15	22	22	35	-----
10,000,000	-----	-----	10	15	25	25	40	-----

Total Estate Tax Shown by This Return.....\$ 544.46

† Credit for estate, inheritance, legacy, or succession tax (see Article 9, Regulations 68, 1924 Edition).....\$ 136.11

† Credit for gift tax (see Article 9, Regulations 68, 1924 Edition)

Total Credits\$ 136.11

Amount of estate tax payable after subtracting credits.....\$ 408.35

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Jurat for Executors and Administrators

We-I, Elizabeth C. Jacobs, the undersigned executrix, do hereby solemnly swear—affirm that on the 24th day of July, 1924, the Probate court at Chicago, Cook County, Illinois,

* If the decedent's death occurred on the date of the passage of any of the revenue acts imposing the estate tax, care must be exercised to use the rates of tax in force at the exact instant of death. (See Article 1, Regulations 68, 1924 Edition.)

† If the decedent died prior to 4.01 p. m., Washington, D. C., time, June 2, 1924, his estate is not entitled to any credit for estate, inheritance, legacy, succession, or gift taxes paid. (See Article 9, Regulations 68, 1924 edition.)

granted letters testamentary upon the estate of the foregoing-named decedent to the undersigned; that I have made diligent search for property of every kind left by the decedent; that I have carefully read the instructions printed on this form; that hereon is listed all of the property, tangible and intangible, forming the gross estate of the decedent so far as it has come to my knowledge and information; that I have carefully read all instructions under Schedule E of this form, and have made diligent and careful search for information as to whether the decedent, during his lifetime, made any transfers without a fair consideration in money or money's worth, and the answers given to the questions therein contained are true and complete to the best of my knowledge, information, and belief, and that I have no knowledge of any transfers made or trusts created by the decedent within two years of his death involving an amount or value equal to or exceeding \$1,000, other than bona fide sales for a fair consideration in money or money's worth, except as stated in Schedule E; that to the best of my knowledge, information, and belief, the value shown for each item of property listed in this return was the fair market value of the same at the day of decedent's death; and that the debts, expenses, and charges entered herein as deductions from the gross estate are correct and legally allowable.

Jurat for Beneficiaries, Custodians, and Trustees

I-We, _____, the undersigned beneficiary _____—Custodian—Trustee, do hereby solemnly swear—affirm that _____ have carefully read the instructions printed on this form; that hereon is listed all of the property, tangible or intangible, contained in the gross estate of the decedent which has come into _____ possession and control; that to the best of _____ knowledge, information, and belief, the value shown for each item of property listed hereon was the fair market value of the same at the time of the decedent's death; and that the debts, expenses, and charges entered hereon as deductions from the gross estate are correct and legally allowable.

ECJ (Name) Elizabeth C. Jacobs
 (Address) 1732 Humboldt Blvd., Chicago.
 (Name) _____
 (Address) _____
 (Name) _____
 (Address) _____

Subscribed and sworn to before me, at Chicago, Cook County, Illinois, this 30th day of July, 1925.

Ada West Aiken,
Notary Public.

(Seal)

Note.—If there is more than one executor or administrator, all must sign and swear to the return.

(The foregoing jurat may be sworn to before any person authorized to administer oaths.)

Name and address of attorney Fischel & Kahn,
820—Number 111 West Monroe Street, Chicago, Illinois.

52 This Sheet Should Not Be Filled in by Taxpayer
Collection District..... Bureau File No.....
Date of death.....
Name of decedent.....
Residence at time of death.....

Tax Record

Tax Shown by Return

Assessments				Payments			
Amount	List	Page	Line	Date	Principal	Interest	Adjustments
*****	*****	3	8	8/1/25	408.35	*****	*****
*****	*****	*****	*****	*****	*****	*****	*****
*****	*****	*****	*****	*****	*****	*****	*****

Total Deficiency Tax.....\$1,796.23
Total Credits\$ 449.06
Net Deficiency Tax.....\$1,347.17

Date of tentative findings 12/23, '26 By A. Warman
Date of 60-day notice By.....
or jeopardy letter.....

Assessments				Payments			
Amount	Interest	List	Page	Line	Date	Amount	Interest
of defi-	on defi-					of defi-	on defi-
ciency,	ciency from					ciency, due date	ciency from
exclu-	due date					exclu-	due date
sive of	of tax to					sive of	to date
interest	date of as-					of assess-	All
	essment					ment	other
							interest
							Adjust-
							ments
.....	.....	301	4	4-20-27	1,347.17	148.18	.....
1,347.17	169.41	June 27	1924	7	.....	.....	.....
.....

(Stamp) Abated \$1,516.58 Refunded 7.48 Interest None MTR—1886
Date 4-28-28 KSP

Dec 23 1926

MT-ET-6009-AW

District of 1st Illinois

Estate of W. Francis Jacobs

Date of death—June 17, 1924

Tentative deficiency \$1,796.23

Elizabeth C. Jacobs, Executrix,

Estate of W. Francis Jacobs,

1732 Humboldt Blvd.,

Chicago, Illinois.

Madam:

The estate tax return filed for the above-named estate has been examined and a deficiency in respect of the tax has been tentatively determined.

If you acquiesce in the deficiency as determined, or in any part thereof, you may sign the enclosed waiver of the restrictions on the assessment of all or so much of the undischarged portion of the deficiency as results from adjustments in which you acquiesce and forward it to the Commissioner of Internal Revenue, Washington, D. C.

If you desire to protest against any portion of the deficiency such protest must be filed with the Commissioner of Internal Revenue within thirty days from the date of this letter. The procedure incident to the filing of a protest is governed by the Regulations relating to Estate Tax, copies of which may be obtained upon application to the Collector or to this office.

This determination is tentative only and no petition herefrom lies to the Board of Tax Appeals. If upon further consideration at the expiration of the 30 day period for filing protest it appears that a deficiency in respect of the tax exists final determination thereof will be made and you will be notified by registered mail in accordance with the provisions of Section 308 (a) of the Revenue Act of 1926.

54 Examination of the return discloses the following:

Correct amount of tax.....	\$2,340.69
Tax shown on the return.....	\$ 544.46

Deficiency	\$1,796.23
------------------	------------

The estate is entitled to an additional credit in the amount of 25 per centum of the deficiency as finally determined, on account of State inheritance tax paid. The undischarged

Exhibit B.

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portion of the deficiency herein determined is \$1,347.17. There will be assessed and collected, as a part of the deficiency, interest upon the undischarged portion thereof at the rate of six per centum per annum from one year after decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The return has been verified as filed except as to the following changes:

Gross Estate	Returned	Tentatively Determined
Real Estate		
Item 1	\$ 20,000.00	\$ 30,000.00
Item 2	35,000.00	46,000.00
Stocks and Bonds		
Item 2	160.00	462.83
Item 3	320.00	1,851.30
Item 4	5,000.00	7,000.00
Item 5	20,475.00	21,210.00
Dividend	196.89	
Item 6	100.00	125.00
Dividend	1.50	
Item 12		7,625.00
Item 18		32.90
Item 19		103.00

55

Mortgages, Notes, Cash and Insurance	Returned	Tentatively Determined	Returned	Tentatively Determined
Interest on Item 1.....	\$ 1,009.60	\$ 722.52		
Item 13	10,000.00	10,135.00		
Item 14	2,391.93	2,891.93		
Received on Policy No. 2946416 Prudential Ins. Co. with post mortem dividend.....		5,061.13		
Other items	48,970.34	48,970.34		
Less insurance payable to specific beneficiaries	36,391.93	40,000.00		
Total.....			\$25,979.94	\$27,780.92
Jointly Owned Property				
Item 1			45,000.00	60,937.50
Lots 11 and 12, Block 1, known as 1732 Humboldt Blvd., Chicago, Illinois				19,000.00
Other Miscellaneous Property				
Error in total.....				100.00
Deductions			Tentatively Determined	Returned
Attorney's fee			\$ 2,700.00	\$ 2,500.00
Miscellaneous administration expenses			150.00	450.00
Debts of decedent.....			1,452.57	93.00
Unpaid mortgages			16,060.47	17,131.16
To balance			69,806.24	

Attorney's fee is deducted in the amount which it appears will be allowed by the court and paid.

56 Miscellaneous administration expenses are deducted as claimed in the return with the exception of Item 2, which was not an enforceable claim against the decedent on the date of death.

Debts of decedent are deducted in the amounts which investigation discloses were obligations of the decedent on the date of death.

Unpaid mortgages are deducted in the amount found upon investigation to be correct.

Enclosed herewith is a summary of the returned and determined values of the gross estate, and also the claimed and allowed deductions.

This case has been audited in accordance with the retroactive provision of the Revenue Act of 1926 with respect to rates of tax.

Respectfully,

R. M. Estes,
Deputy Commissioner.

VRL—Encl.

57

Estate of W. Francis Jacobs.

MT-ET-6009-AW-1st Illinois.

Date of death—June 17, 1924.

Summary

	Returned (706)	Tentatively Determined on Review
Gross Estate:		
Real estate	\$ 55,000.00	\$ 76,000.00
Stocks and bonds	26,753.39	38,910.03
Mortgages, notes, cash, and insurance	25,979.94	27,780.92
Jointly owned property	45,000.00	79,937.50
Other miscellaneous property	1,640.00	1,640.00
Transfers	-----	-----
Powers of appointment	-----	-----
Property identified as previously taxed	-----	-----
Total gross estate	154,273.33	224,268.45
Deductions:		
Funeral expenses	771.10	771.10
Administration expenses—		
Executors' commissions	3,000.00	3,000.00
Attorneys' fees	2,500.00	2,700.00
Miscellaneous	450.00	150.00
Debts of decedent	93.00	1,452.57
Unpaid mortgages	17,131.16	16,060.47
Net losses during settlement	-----	-----
Support of dependents	8,100.00	8,100.00
Property identified as previously taxed	-----	-----
Charitable, public, and similar gifts and bequests ..	-----	-----
Specific exemption (resident decedents only)	50,000.00	50,000.00
Total Deductions	82,045.26	82,234.14
Net estate for tax	72,228.07	142,034.31
Total tax	544.46	2,340.69
Tentative Deficiency Tax	-----	1,796.23
Credits for estate, inheritance, legacy, or succession tax	136.11	585.17
Credit for gift tax	-----	-----

Treasury Department
Internal Revenue Bureau
Estate Tax Division

Form 7821A—Revised March 1925.

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38-69



58

Treasury Department

Washington

(Seal)

Office of
Commissioner of Internal Revenue

List

Page 304, Line 7

\$1347.17 Ass'd

169.41 June 1927.

6-17-25 to 7-22-27.

Assess. Ctf. Tax \$1347.17

Assess. Int. 6% from 6-17-25 do

By MMS Date 6-24-27.

MT-ET-C1 6009-REB

District of 1st Illinois

Estate of E. Francis Jacobs

Date of death June 17, 1924.

Elizabeth C. Jacobs, Executrix,

Estate of E. Francis Jacobs,

1732 Humboldt Blvd.,

Chicago, Illinois.

Madam:

The Bureau has no record of the receipt of a protest on behalf of the above-named estate against the tentative findings disclosed in its letter addressed to the executor under date of Dec. 23, 1926, in view of which fact the tentative findings set forth in said letter, a copy of which is attached hereto and made a part hereof, are hereby made final and the deficiency in the estate tax is determined to be \$1,793.23.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60 day period prescribed.

Where a taxpayer has been given an opportunity to file a

petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,

(Signed) C. E. Nash,
Acting Commissioner.

Enclosures:

Statement,

Waiver—Form 890

"EXHIBIT D."

Execute Separate Form for Each Tax Period
Claim FC

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

- ☐ Abatement of Tax Assessed
☐ Credit Against Outstanding Assessments
☒ Refund of Taxes Illegally Collected
☐ Refund of Amounts Paid for Stamps Used in Error or Excess

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by
Administrative Unit

(Stamp Illegible)

Stamp here

State of Illinois, }
County Cook. } ss.

Type or Print

Elizabeth C. Jacobs, individually
and as Executrix of the estate of
W. Francis Jacobs
(Name of taxpayer or purchaser of
stamps.)

1732 Humboldt Boulevard, Chi-
cago, Illinois
(Residence—give street and number as
well as city or town and State.)

None
(Business address.)

Collector's Notation

District

Account number

Date received

Stamp here

Collector of Internal Revenue

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged
None

2. Character of assessment or tax Federal estate tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased..\$1,903.70

Period	Year
From:	19.....
To:	19.....

4. Reduction of Tax Liability requested (Income and Profits Tax)\$_____
5. Amount to be abated.....\$_____
6. Amount to be refunded (or such greater amount as is legally refundable).....\$1,800.00
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Aug. 7, 1925, April 20, 1927.
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed.....
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit....\$_____
11. Unpaid assessment against which credit is asked; period from_____to_____ \$_____

Deponent verily believes that this application should be allowed for the following reasons:

(Attach additional sheets if necessary.)

Signed: Elizabeth C. Jacobs.

Sworn to and subscribed before me this 19 day of Sept., 1927.

(Seal)

L. H. Durfee,
Notary Public.
(Title.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of Taxpayer	Character of assessment and period covered	List Year	Month	Page	Line	Amount	Date paid	District in which paid
Estate of W. Francis Jacobs	Estate	Est. 1925	Aug.	3	8	\$ 408.35	8/1/25	1st Ill.
	Office Claim	1927	Apr.	301	4	1,495.35	4/20/27	"
		9/14/27	June	304	7	1,516.58	x x	x x
		Refund Claim	4/22/27	—	—	207.58	Rej.-MT:ET-	1011

(In right-hand margin) Schedule No.

E. M. B.

Claim Clerk.

Mabel G. Reinecke,

Collector of Internal Revenue.

M. Emery,

Assessment Clerk, Commissioner's Office.

I certify that the records of my office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	Serial Number	Period commencing—
					\$.....		

(In left-hand margin) Claim No.

(In right-hand margin) Claim No.

Collector District

Schedule Number District

Allowed or Rejected Number (Nature of tax.)

Claimant
Address

Examined and submitted for action, 19.....

Claim examined by—	Committee on Claims
Amount claimed...\$.....	
Claim approved by—	Amount allowed...\$.....
Chief of Division.	Amount rejected...\$.....

(In left-hand margin) Schedule No.

(Stamp) Office of Internal Revenue Received Oct 3 1927 Estate Tax

61 (1) The value of the premises at 2400 W. North Avenue, Chicago, Illinois, shown as Item No. 2 of Schedule A, Form 706, heretofore filed was not in excess of \$35,000 on June 17, 1924, the date of the death of said decedent, and the increase in the valuation thereof to \$46,000 made by the Commissioner of Internal Revenue was incorrect and improper.

(2) The inclusion by the Commissioner of Internal Revenue in the gross estate of said decedent of the property at 2749-59 Monticella Avenue, Chicago, Illinois, which was jointly owned by the decedent and the deponent, and the valuation thereof in the sum of \$60,937.50 were incorrect and improper. The deponent made a substantial contribution out of her own money toward the purchase price of said premises.

(3) The inclusion by the Commissioner of Internal Revenue in the gross estate of said decedent of the property at 1732 Humboldt Boulevard, Chicago, Illinois, which was jointly owned by the decedent and the deponent, and the valuation thereof in the sum of \$19,000 were incorrect and improper. The title to this property in joint tenancy was acquired by the decedent and the deponent by deed dated July 29, 1909, and delivered on or about August 5, 1909, and recorded in the Recorder's Office of Cook County on August 6, 1909.

(4) From the gross estate of said decedent there should be deducted the further sum of \$850, being the amount of the claim of Harry D. Knight for services rendered to the decedent in his lifetime as an attorney, which claim has been allowed in the Probate Court and paid out of the estate of said decedent since the filing of said Form 706. This appears as Item No. 4 of Schedule I, Form 706.

McCulloch & McCulloch
Lawyers
585 Illinois Merchants Bank Building
231 South LaSalle St.
Chicago

(Stamps): Received Sept. 20, 1927. Received Oct. 3, 1927,
Office of Internal Revenue. Estate Tax.

Frank H. McCulloch
Catharine Waugh McCulloch
Oscar A. Ross
Jacob E. Replogle
Hugh W. McCulloch
Grover C. McLaren
Roy J. Chowen
William D. Doggett
Hathorn W. McCulloch
Clarence E. Tripp
Gaylord A. Toft
Harry S. Flynn

September 19, 1927.

Collector of Internal Revenue,
Chicago, Illinois.

Dear Madam:

We forward you herewith Form 843, Claim for Refund—
Elizabeth C. Jacobs. If you have any question with refer-
ence to this matter, please advise the writer, as we now repre-
sent Mrs. Jacobs in this matter.

Sincerely yours,

McCulloch & McCulloch,
By Hugh W. McCulloch.

HWM:S
Encl.

63

EXHIBIT E.

State of Illinois }
County of Cook. } ss.

The undersigned, Elizabeth C. Jacobs, being first duly sworn, deposes and says that the facts given below are true and complete:

1. That she makes this affidavit in support of the claim heretofore filed by her individually and as Executrix of the Estate of W. Francis Jacobs, MT-ET-C1-6009-CTK District of First Illinois Estate of W. Francis Jacobs Date of death: June 17, 1924, pursuant to the suggestion of the Commissioner of Internal Revenue.

2. That the premises referred to in Paragraph 2 of said claim for refund filed by the undersigned and known as 2749-59 Monticello Avenue, Chicago, Illinois, were acquired by Warranty Deed dated November 23, 1917, from Bergitte M. Brandt and Albert E. Brandt, her husband, a true and photostatic copy of the original of said deed being attached hereto, marked "Exhibit 1".

3. That the premises referred to in Paragraph 3 of said claim for refund filed by the undersigned and known as 1732 Humboldt Boulevard, Chicago, Illinois, were acquired by Warranty Deed dated July 29, 1909, from Lena De St.

George, a true and photostatic copy of the original of
64 said deed being attached hereto, marked "Exhibit 2".

4. That the inclusion of said jointly owned property in the gross estate of W. Francis Jacobs, subject to Federal Estate Tax, is improper and not warranted by law.

Elizabeth C. Jacobs.

Subscribed and sworn to before me this 2 day of April,
A. D., 1928.

Hugh W. McCulloch,
Notary Public.

"EXHIBIT F."

TREASURY DEPARTMENT
Office of
Commissioner of Internal Revenue
Washington

CWM

Apr 28 1928

(Stamp) Received Jun 1 1928 Estate Tax
(Cut)

Miscellaneous Tax Unit

MT-ET-CTK

Elizabeth C. Jacobs, Executrix
u/w of W. Francis Jacobs,
1732 Humboldt Boulevard,
Chicago, Illinois.

Certificate of
Overassessment
Number: 6009—1st Illinois
Allowed: \$1,524.06
Schedule No. MTR-1886

Madam:

An audit of the estate tax return, Form 706, of the estate of W. Francis Jacobs, who died June 17, 1924 and a consideration of all the claims (if any) filed by you indicates that the tax assessed against the estate was in excess of the amount due as per the following statement:

Original assessment (August 1925, P. 3, L. 8)	\$ 408.35
Additional " (April 1927, P. 301, L. 4)	1,495.35
Additional " (June 1927, P. 304, L. 7)	1,516.58
Total tax and interest assessed	\$3,420.28
Less correct tax liability	\$2,323.67
Credit on account of State inheritance tax paid	580.92
Net tax payable	\$1,742.75
Interest on portion of tax shown by the re- turn not discharged by credit	6.06
Interest on portion of deficiency not dis- charged by credit	147.41
	1,896.22
Overassessment	\$1,524.06

(See attached statement)

The amount of the overassessment will be abated or re-
funded as indicated below. (The estate will be relieved from

the payment of any amount abated; and any amount found to be refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the amount found to be refundable.

Date claim filed September 20, 1927.

Date collector's claim filed—September 19, 1927.

District 1 Ill.

Interest: none

Record of Audit and Review

Date

Return audited: CTK 4-10-28

Reviewed (Unit) ZZ 4-14-28

Review Section

Approved: L H Mueller

4-/21/28

Head of Division

Approved: B B Millin

Approved: R. M. Estes

Committee

Form 7924-C

Form approved by Comptroller
General U. S. April 5, 1927

Bureau Record Copy

(In left-hand margin) Form 7805B sgd. by Commr.
_____, 192 : Abated, \$1,516.58 Form 7920 No. MTR
1886, sgd. by Commr. 4/28, 1928 : Refunded, \$7.48

66

	Est.	1925	Aug.	3	8	408 35	8-1-25	408 35	Pd.
Additional	Misc.	1927	Apr.	301	4	1347 17	4-20-27	1347 17	Pd.
Interest	Misc.	1927	Apr.	301	4	148 18	4-20-27	148 18	Pd.
Additional	Misc.	1927	June	304	7	1347 17	4-28-28	1347 17	Ab.
Interest	Misc.	1927	June	304	7	169 41	4-28-28	169 41	Ab.
						3420 28		3420 28	

Mabel G. Reinecke,

Collector of Internal Revenue.

By Jno. P. Muldoon,

Deputy Collector.

(Stamp) Received Apr 27 1928 Estate Tax Div.

67 MT-ET-C1-6009-CTK

District of 1st Illinois

Estate of W. Francis Jacobs.

In the claim the contention is made that certain items of real estate were overvalued. No evidence has been submitted in support of this contention although an opportunity to sub-

mit evidence was given. The values fixed by the Bureau are based upon the evidence obtained from real estate experts.

The second contention is that the decedent's wife contributed to the purchase price of Item 1 of Jointly Owned Property. Her contribution to the extent of one sixteenth was conceded. The total value of the property was found to be \$65,000.00, and in view of the wife's contribution only \$60,937.50 was included in the gross estate.

The third contention presented is that nothing should be included in the statutory gross estate on account of property held under a joint tenancy created on July 29, 1909. In subdivision (h) of Section 302 of the Revenue Act of 1924 it is provided that "Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The final contention is that additional deduction should be made under the caption "Debts of decedent" in the amount of \$850.00. The net estate previously valued at \$142,034.31 is now valued at \$141,184.31, the tax on the transfer of which is \$2,325.67.

The certificate of overassessment reflects the adjustment shown above and also the correction of a duplicate assessment of deficiency.

This Indenture Witnesseth, That the Grantor Lena De St. George, a widow, of the City of Brooklyn in the County of Kings and State of New York for and in consideration of the sum of Seven Thousand Dollars, in hand paid, Conveys and Warrants to W. Francis Jacobs and Eliazbeth C. Jacobs, husband and wife, as joint tenants and not as tenants in common of the City of Chicago, County of Cook and State of Illinois the following described Real Estate, to-wit:

Lots Eleven (11) and Twelve (12) in Block One (1) in Johnston and Cox's Subdivision of the South West Quarter (S.W.¼) of the South West Quarter (S.W.¼) of Section Thirty-six (36) in Township Forty (40) North, Range Thirteen (13), East of the Third Principal Meridian situated in the City of Chicago in the County of Cook in the State of Illinois hereby releasing and waiving all rights under and by

virtue of the Homestead Exemption Laws of the State of Illinois.

Subject to all taxes from and after July 9th, 1909.

Subject also to all unpaid special taxes or assessments levied for improvements not yet made.

Witness my hand and seal this 29th day of July A. D. 1909.

(signed) Mrs. Lena De St. George (Seal)

State of Illinois }
County of Cook } ss.

I, Henry B. M. Berentson, a notary public in and for the said County, in the State aforesaid, Do Hereby Certify that Lena De St. George, a widow, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that she signed, sealed and delivered the said instrument as her free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 5th day of August A. D. 1909.

(signed) Henry B. M. Berentson,

(Notarial Seal)

Notary Public.

My commission expires Feb. 11, 1911.

Box 1019

Warranty Deed

Individual to Individual

Lena De St. George

To

W. Francis Jacobs

Elizabeth C. Jacobs

State of Illinois }
County of Cook } ss.

No. 4417756

Filed for Record 1909 Aug 6 PM 2 08 and recorded in book 10756 of records page 592.

Abel Davis,
Recorder.

EXHIBIT H.

This Indenture, made this 23rd day of November, 1917, between Bergitte M. Brandt and Albert E. Brandt, her husband, of the City of Chicago in the County of Cook and State of Illinois parties of the first part, and W. Francis Jacobs and Elizabeth C. Jacobs, his wife, of the City of Chicago in the County of Cook and State of Illinois, parties of second part.

Witnesseth, that the parties of the first part, for and in consideration of the sum of Ten Dollars and all other good and valuable consideration, in hand paid, convey and warrant to the said parties of the second part, not as tenants in common, but as joint tenants, the following described Real Estate to-wit:

Lot Ten (10) and the west 22 feet of Lot Nine (9), in Block One (1) in Cratty and Kirkeby's Subdivision of Lot One (1) in Kimbell's Subdivision of the East half (E. $\frac{1}{2}$) of the South West quarter (S.W. $\frac{1}{4}$) and the West half (W. $\frac{1}{2}$) of the South East quarter (S.E. $\frac{1}{4}$) of Section Twenty-six (26), Township Forty (40) North, Range Thirteen (13) East of the Third Principal Meridian except Twenty-five (25) acres in the North East corner.

Subject to a Trust Deed dated December 1, 1915, made by George H. J. Haas and Louise P. Haas, his wife, to Chicago Title and Trust Company to secure their indebtedness of \$26000.00 secured by their 59 bonds of even date therewith payable to the order of bearer or registered owner thereof without grace as follows: Nos. 1 and 2 for \$500 each December 1, 1917; No. 3 for \$500.00 June 1, 1918; Nos. 4 and 5 for \$500 each December 1, 1918; No. 6 June 1, 1919 for \$500.00; Nos. 7 and 8 for \$500.00 each December 1, 1919; No. 9 for \$500.00 June 1, 1920; Nos. 10 to 24 for \$100.00 each, Nos. 25 to 54 for \$500.00 each and Nos. 55 to 59 for \$1000.00 each December 1, 1920, with interest until maturity at 6 per cent per annum; Also, subject to a Trust Deed dated March 4, 1915 made by George H. J. Haas and Louise P. Haas, his wife to Will J. Bell, securing their note bearing even date thereof No. 346 for \$4000.00 payable to the order of themselves as follows: \$50.00 on June 15, 1916; and on the 15th of each month thereafter for 29 months succeeding and a payment of \$1500.00 on December 15, 1918 and a final payment of \$1000.00 on December 15, 1918, provided, however, that if the premises securing this note are sold by the makers thereof, then this final payment of \$1000.00 shall become immediately

due and payable without notice to the maker thereof, said indebtedness bears interest at 6% per annum upon the whole amount of said principal sum remaining from time to time unpaid, said interest payable monthly.

situated in the City of Chicago County of Cook in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption laws of the State of Illinois.

The Premises Hereinabove Mentioned are expressly hereby declared to pass, not in tenancy in common, but in joint tenancy.

Subject to all taxes and assessments levied after the year 1916.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Bergitte M. Brandt (Seal)

Albert E. Brandt (Seal)

State of Illinois ss.
Cook County

I, F. S. Kunkel, a Notary Public in and for the said County, in the State aforesaid, Do Hereby Certify that Bergitte M. Brandt and Albert E. Brandt, her husband, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notarial seal this 23rd day of November A. D. 1917.

(Notarial Seal) (signed) F. S. Kunkel,
Notary Public.

Envelope
Warranty Deed
Joint Tenancy
Bergitte M. Brandt and
Albert E. Brandt, her husband
To
W. Francis Jacobs and
Elizabeth C. Jacobs, his wife
F. S. Kunkel & Co.
2640 Milwaukee Ave.
Albany 6010
Envelope

Defendant's Requested Findings.

State of Illinois }
Cook County } ss.

No. 6236940

Filed for Record 1917 Nov 26 AM 11 31 and recorded in
book 14579 of records page 590

Joseph F. Haas,
Recorder.

led May 24,
1934.

70 And on, to wit, the 24th day of May, A. D. 1934 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Request for Findings of Fact and Conclusions of Law in words and figures following, to wit:

71 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—39407) * *

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the defendant in the above entitled cause and respectfully requests the Court to make and enter the following specific findings of fact, and to declare and enter the following conclusions of law, to-wit:

Findings of Fact.

Defendant requests that the Court adopt the stipulation of facts filed by the parties as the Court's findings of facts in this case.

Upon the foregoing findings of fact, which are hereby made a part of the judgment herein, the Court finds and enters the following:

Conclusions of Law.

I.

72 The Revenue Act of 1924 requires the inclusion of the full value of the property on Monticello Avenue owned by decedent and his wife as joint tenants in the gross estate of decedent for Federal estate tax purposes.

II.

The Revenue Act of 1924, in so far as it imposes a Federal estate tax on the full value of the property on Monticella Avenue held by the decedent and his wife as joint tenants, is a constitutional and valid exercise of the powers granted Congress by the Constitution of the United States.

III.

The Revenue Act of 1924 requires the inclusion of the full value of the property on Humboldt Boulevard owned by decedent and his wife as joint tenants in the gross estate of decedent for Federal estate tax purposes.

IV.

The Revenue Act of 1924, in so far as it imposes a Federal estate tax on the full value of the property on Humboldt Boulevard held by the decedent and his wife as joint tenants, is a constitutional and valid exercise of the powers granted Congress by the Constitution of the United States.

V.

The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected from the plaintiff.

VI.

The evidence in this case is insufficient in law to warrant a judgment against the defendant.

VII.

The defendant on the pleadings and the evidence in this case is entitled to judgment dismissing plaintiff's petition at plaintiff's costs.

73 In the event that the Court fails or refuses to make, adopt, or enter the foregoing findings of fact and conclusions of law, or any thereof, defendant respectfully ex-

cepts and prays that it be allowed an exception or exceptions to such action or ruling of the Court, and the defendant further excepts and prays that it be allowed an exception to any ruling and action of the Court in making and entering any other findings of fact or conclusions of law, or either thereof.

Respectfully submitted,

Michael L. Igoe,

May, 1937.

United States Attorney.

June 10,
7.

74 And afterwards, to wit, on the 10th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge appears the following entry, to wit: Memorandum:

75 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—39407) * *

MEMORANDUM.

June 10, 1937.

WOODWARD, *District Judge:*

The Court will find the issues for the plaintiff, both as to the Monticello Avenue property and Humboldt Boulevard property.

The court will find the facts as set forth in the stipulation of the parties filed in the cause.

In either case the tax may be measured only by the value of decedent's interest which passed at death and not by the value of the whole interest, which would include the value of the interest of the surviving joint tenant.

The Act of 1924 cannot be given retro-active operation.

The Act under which this suit is brought provides that

"It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon." 28 U. S. C. A. 764."

Plaintiff's attorneys will tender for signature formal findings of fact and conclusions of law, together with a form of judgment in conformity with the conclusions herein stated and in conformity with the statute above quoted.

76 And afterwards, to wit, on the 17th day of June, A. D. 1937, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

Filed June 17
1937.

77 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—39407) • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This is an action to recover the amount of a tax paid by the plaintiff, which she alleges was the result of an illegal estate tax assessment measured by the properties held by the decedent and his spouse, as joint tenants.

The tax, insofar as disputed here was assessed under Section 302 (e) and (h) of the Revenue Act of 1924, Chapter 234, 43 Stats, 253, 304 (U. S. C., Title 26, Section 1094).

The Court makes the following findings of fact and conclusions of law.

Findings of Fact.

7 The Court finds the fact as set forth in the Stipulation of the parties, which is as follows:

78 1. On June 17, 1924, W. Francis Jacobs died a citizen of the United States and resident of Chicago, Illinois, leaving a last Will and Testament thereafter duly admitted to probate in the Probate Court of Cook County, and Elizabeth C. Jacobs was appointed executrix thereof, and letters testamentary were issued to her and that said letters testamentary were reissued to her on May 3, 1928, and are now in full force and effect.

2. That Mabel G. Reinecke, formerly Collector of Internal Revenue for the First District of the State of Illinois, to whom the payment of the Federal estate tax due from the estate of W. Francis Jacobs was made, is no longer in office and is no longer acting as such Collector of Internal Revenue.

3. On August 1, 1925, Elizabeth C. Jacobs as executor of the Estate of W. Francis Jacobs, filed with the Collector of Internal Revenue for the First District of Illinois a Federal estate tax return on Form 706, which disclosed a gross estate of \$154,273.33, claimed deductions in the amount of \$82,045.26,

resulting in a net estate of \$72,228.07, and a gross Federal estate tax of \$544.46. Credit on account of State inheritance tax payments was claimed in the amount of \$136.11, resulting in a net Federal estate tax of \$408.35, which amount was paid on August 1, 1925. A copy of said return is hereto attached, marked "Exhibit A" and by reference is made a part hereof.

4. Thereafter, the Commissioner of Internal Revenue made an audit and review of said estate and tentatively determined that there was a deficiency in respect of the tax in the amount of \$1,796.23. An additional credit on account of state inheritance tax payments was allowed in the amount of \$449.06, making a total credit of \$585.17, and resulting in an undischarged deficiency of \$1,347.17. The result of this audit and review by the Commissioner was fully set forth in letter dated December 23, 1926, which was mailed to the executrix of this estate. A copy of said letter of December 23, 1926 is hereto attached, marked "Exhibit B" and by reference is made a part hereof.

5. No protest was filed on behalf of the estate against the tentative findings made by the Commissioner as set forth in letter of December 23, 1926. Therefore the Commissioner of Internal Revenue made a final determination that there was an undischarged deficiency in the estate tax in the amount of \$1,347.17, and under date of March 22, 1927 mailed a letter to the executrix of this estate, advising her that the tentative findings set forth in said letter of December 23, 1926, were made final and that the undischARGE deficiency in the estate tax was determined to be \$1,347.17. A copy of said letter of March 22, 1927, is hereto attached, marked "Exhibit C" and by reference is made a part hereof.

6. On April 20, 1927, the executrix paid this deficiency tax of \$1,347.17, plus interest in the amount of \$148.18, making a total payment of \$1,495.35.

7. On September 20, 1927, a claim for refund was filed by the executrix, a copy of which is hereto attached, marked "Exhibit D" and by reference is made a part hereof. Thereafter, on April 2, 1928, the executrix forwarded to the Commissioner of Internal Revenue an affidavit in support of her claim for refund, a copy of said affidavit is attached hereto as "Exhibit E", and by reference made a part hereof.

The claim for refund was allowed by the Commissioner in the amount of \$7.48, which amount was refunded to the executrix on May 28, 1928. The claim was rejected as to the balance. A copy of the certificate of overassessment showing

the action taken by the Commissioner on this claim for refund is attached hereto, marked "Exhibit F", and by reference made a part hereof.

8. The Federal estate tax return filed by the executrix (Exhibit A) disclosed and included for tax under Schedule D (jointly owned property) as a part of the decedent's statutory gross estate the following item of property:

2749-59 Monticello Avenue, Chicago, Illinois, Encumbrance—\$17,000. Improved with three-story brick 18 flat building. Elizabeth C. Jacobs, widow of decedent, contributed \$3,000.00 toward purchase of this property. Fair market value of property at date of death—\$48,000.00; Amount to be included in gross estate—\$45,000.00.

This property was acquired by the decedent and his wife as joint tenants on November 23, 1917, and continued to be held by him and his wife as such joint tenants until the date of his death. A copy of the deed conveying this property to the decedent and his wife as joint tenants is attached hereto, marked "Exhibit G", and by reference is made a part hereof. Decedent's wife, Elizabeth C. Jacobs, contributed \$3,000 or one-sixteenth of the price paid toward the purchase of this property and the decedent contributed the other fifteen-sixteenths. Except for the one-sixteenth contribution afore-
80 said, no part of this property, and no part of the funds which were used to purchase it originally belonged to the said Elizabeth C. Jacobs.

9. In the audit of this estate tax return, the Commissioner of Internal Revenue retained as a part of this decedent's gross estate the above-described property which was owned by the decedent and his wife as joint tenants, and not as tenants in common. The Commissioner, however, increased the value of this property to \$65,000.00, and included as a part of the gross estate of this decedent the sum of \$60,937.50, this being 15/16th of the value of the property and representing the proportion contributed toward the purchase price by this decedent, the other 1/16th having been contributed by the wife of the decedent.

10. In the audit of this estate tax return, the Commissioner of Internal Revenue included as a part of the decedent's statutory gross estate the following property:

Lots 11 and 12, Block 1, known as 1732 Humboldt Boulevard, Chicago, Illinois.

The Commissioner determined that the value of this property was \$19,000.00 and that it was taxable at its full value.

This property was acquired by the decedent and his wife, as joint tenants on July 29, 1909, and decedent and his wife continued to hold such property in joint tenancy until the date of decedent's death. A copy of the deed conveying this property to the decedent and his wife, as joint tenants, is attached hereto and marked "Exhibit H", and by reference is made a part hereof. No part of this property and no part of the funds which were used to purchase it originally belonged to Elizabeth C. Jacobs, the widow of the decedent, but to the contrary the funds which were used to purchase it were the individual property of the decedent.

11. At the time of the decedent's death, there was a mortgage on the Monticello Avenue Property described in paragraph 8, in the amount of \$16,060.47. In the final audit of this estate the Commissioner of Internal Revenue allowed this amount as a deduction from the gross estate of the decedent for estate tax purposes. It is stipulated and agreed that if said Monticello Avenue property should be excluded from the decedent's statutory gross estate then and in that event the deductions allowable from the adjusted gross estate should be reduced from the amount originally allowed by the Commissioner of Internal Revenue by the amount of \$16,060.47, the mortgage deduction so allowed, and any recovery by the plaintiff herein, should be reduced accordingly. It is further stipulated and agreed that if any portion of said Monticello Avenue property be excluded from the decedent's statutory gross estate then and in that event a like portion of the said \$16,060.47 deduction should be disallowed, and should reduce any recovery by the plaintiff proportionately.

12. That no part of said tax paid by said Elizabeth C. Jacobs, Executrix under the last Will and Testament of W. Francis Jacobs, deceased, has been refunded or repaid by said Mabel G. Reinecke, as Collector of Internal Revenue, or by any other person whomsoever, except the sum of \$7.48 above referred to.

13. That service of a copy of the petition filed in the above entitled cause was made as required by law upon the District Attorney of the United States for the Northern District of Illinois, Eastern Division on March 25, 1931, and upon the Attorney General of the United States at Washington, D. C.

Conclusions of Law.

1. The estate tax on the estate of the deceased joint tenant may not be measured by the inclusion of the value of the interest of the surviving joint tenant.

2. The estate tax on the estate of the deceased joint tenant may validly be measured by one-half (the decedent's half) of the property held by the two joint tenants.

3. Insofar as the Humboldt Boulevard property, which was acquired before 1916, is concerned, the Revenue Act of 1924 cannot be given a retroactive operation so as to tax more than one-half the said property to the decedent's estate.

82 4. The pleadings and the facts as stipulated by the parties are sufficient in law to warrant a judgment against the defendant insofar as there was included in the measure of the tax on the decedent's estate more than one-half the value of the property held by him and a survivor in joint tenancy.

5. Plaintiff is entitled to a judgment for the amount of the overassessment, namely \$502.55, plus interest from April 21, 1927 at six per cent (6%), amounting to \$306.24, making a total of \$808.79.

Enter:

Charles E. Woodward,
Judge.

Dated: June 17, 1937.

83 And afterwards, to wit, on the 17th day of June, A. D. 1937 being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge appears the following entry, to wit:

Entered June
17, 1937.

84 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—39407) * *

JUDGMENT.

This cause coming on to be heard and the Court having considered the evidence and arguments of counsel and being fully advised in the premises and having made findings of fact and conclusions of law in said cause,

It Is Ordered And Adjudged that Judgment be, and it is

hereby entered in favor of the plaintiff and against the defendant in the sum of Eight Hundred Eight Dollars Seventy-Nine Cents (\$808.79) and costs.

Enter:

Charles E. Woodward

Judge

Dated: June 17 1937.

red June
1937.

85 And afterwards, to wit, on the 17th day of June, A. D. 1937 being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge appears the following entry, to wit:

86 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—39407) • •

ORDER.

Judgment having this day been entered for the plaintiff in the above entitled cause, It Is Ordered that the record of said cause show the exceptions of the defendant

(a) To the Court's failure to make the findings requested by the defendant;

(b) To the denial of defendant's motion for Judgment;

(c) To the entry of Judgment for the plaintiff.

It Is Further Ordered that the time for filing the Bill of Exceptions in the above cause be extended sixty (60) days beyond the thirty (30) days allowed by the statute, namely, until September 15, 1937.

Enter:

Charles E. Woodward

Judge

Dated: June 17, 1937.

87 And on, to wit, the 13th day of September, A. D. 1937 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Notice in words and figures following, to wit:

Petition for Appeal.

77

88 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—39407) • •

NOTICE OF APPEAL.

To: McCulloch, McCulloch & McLaren,
857, #231 South La Salle Street,
Chicago, Illinois.
Attorneys for Plaintiff.

The defendant, the United States of America, hereby serves its notice that it will appeal from the decision entered in the above entitled cause on June 17, 1937.

M. L. Igoe,
Michael L. Igoe,
United States Attorney.

Received a copy of the above and foregoing Notice of Appeal this 13th day of September, A. D. 1937.

McCulloch, McCulloch & McLaren
Attorneys for Plaintiff.

89 And on, to wit, the 14th day of September, A. D. 1937 came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Petition in words and figures following, to wit:

Filed Sept. 14
1937.

90 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—39407) • •

PETITION FOR APPEAL.

To The Honorable Judges Of The District Court Of The United States For The Northern District Of Illinois:

Now comes the United States of America, defendant in the above entitled action, by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, as petitioner, and respectfully shows that on the 17th day of June, 1937, the Court found the issues in this cause against your petitioner and in favor of the plaintiff, Elizabeth C. Jacobs, Executrix under the Last Will and Testament of W. Francis

Jacobs, deceased, and entered a final judgment on the said date against your petitioner and in favor of the plaintiff.

Your petitioner feeling itself aggrieved by the said judgment, pursuant to the authority and direction of the Attorney General of the United States, herewith petitions the Court for an order allowing it to prosecute an appeal in the United States Circuit Court of Appeals for the Seventh Circuit under the laws of the United States in such cases made and provided.

91 Wherefore, the premises considered, your petitioner prays that an appeal in this behalf be allowed to the United States Circuit Court of Appeals for the Seventh Circuit, City of Chicago, State of Illinois, in said Circuit, for the correction of the errors complained of and herewith assigned, and that an order be entered allowing the said appeal without bond of the defendant, it appearing that the above entitled cause is one in which the United States is the real party in interest and that this petition for appeal is filed pursuant to the authority and direction of the Attorney General of the United States.

Dated this 14th day of September, A. D. 1937.

M. L. Igoe (B)

Michael L. Igoe,

United States Attorney.

1 Sept. 14, 37. 94 And on, to wit, the 14th day of September, A. D. 1937, came the Defendant by its attorneys and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

95 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—39407) * *

ASSIGNMENT OF ERRORS.

Comes now the United States of America, the above named defendant, by Michael L. Igoe, United States Attorney for the Northern District of Illinois, and David L. Bazelon, Assistant United States Attorney for said District, and respectfully submits the following assignments of error upon which it relies in support of its appeal from the judgment entered on June 17, 1937, by this Court in this cause, and under which

assignments of error said defendant, as appellant, seeks reversal of the decision and judgment of this Court.

I.

The Court erred in concluding as a matter of law and adopting conclusion of law No. 1 made by the Court as follows:

The estate tax on the estate of the deceased joint tenant may not be measured by the inclusion of the value of the interest of the surviving joint tenant.

in that the facts are undisputed and the Revenue Act of 1924 constitutionally requires that an estate tax be paid on the
96 entire value of property held by a decedent and another in joint tenancy.

II.

The Court erred in concluding as a matter of law and adopting conclusion of law No. 3 made by the Court as follows:

In so far as the Humboldt Boulevard property, which was acquired before 1916, is concerned, the Revenue Act of 1924 cannot be given a retroactive operation so as to tax more than one-half the said property to the decedent's estate.

in that the Revenue Act of 1924 specifically requires that a Federal estate tax be paid on the entire value of property held in joint tenancy, where the tenancy was created prior to the enactment of said revenue act, and in so requiring the Revenue Act of 1924 is entirely constitutional and valid.

III.

The Court erred in concluding as a matter of law and adopting conclusion of law No. 4 made by the Court as follows:

The pleadings and the facts as stipulated by the parties are sufficient in law to warrant a judgment against the defendant in so far as there was included in the measure of the tax on the decedent's estate more than one-half the value of the property held by him and a survivor in joint tenancy.

in that the record contains no sufficient or substantial evidence to sustain a judgment in favor of the plaintiff and against the defendant.

IV.

The Court erred in concluding as a matter of law and adopting conclusion of law No. 5 made by the Court as follows:

Plaintiff is entitled to a judgment for the amount of the overassessment, namely, \$502.55, plus interest from April 21, 1927 at six per cent, amounting to \$306.24, making a total of \$808.79.

in that under the pleadings and evidence in this case the defendant was entitled to a judgment dismissing the bill of complaint.

97

V.

The Court erred in refusing to make defendant's requested conclusion of law No. 1 and to conclude:

The Revenue Act of 1924 requires the inclusion of the full value of the property on Monticello Avenue owned by decedent and his wife as joint tenants in the gross estate of decedent for Federal estate tax purposes.

VI.

The Court erred in refusing to make defendant's requested conclusion of law No. 2 and to conclude:

The Revenue Act of 1924, in so far as it imposes a Federal estate tax on the full value of the property on Monticello Avenue held by the decedent and his wife as joint tenants, is a constitutional and valid exercise of the powers granted Congress by the Constitution of the United States.

VII.

The Court erred in refusing to make defendant's requested conclusion of law No. 3 and to conclude:

The Revenue Act of 1924 requires the inclusion of the full value of the property on Humboldt Boulevard owned by decedent and his wife as joint tenants in the gross estate of decedent for Federal estate tax purposes.

in that the facts are undisputed and show every element to be present necessary to the imposition of a tax on the full value of property held by the decedent and his wife as joint tenants under Section 302 of the Revenue Act of 1924.

VIII.

The Court erred in refusing to make defendant's requested conclusion of law No. 4 and to conclude:

The Revenue Act of 1924, in so far as it imposes a Federal estate tax on the full value of the property on Humboldt Boulevard held by the decedent and his wife as joint tenants, is a constitutional and valid exercise of the powers granted Congress by the Constitution of the United States.

98

IX.

The Court erred in refusing to make defendant's requested conclusion of law No. 5 and to conclude:

The taxes sought to be recovered in this action were lawfully assessed by the Commissioner of Internal Revenue and legally collected from the plaintiff.

in that the facts are undisputed, and under these facts and the law applicable thereto, the taxes were legally due from the plaintiff.

X.

The Court erred in holding that property held by husband and wife in a joint tenancy created prior to the enactment of the Revenue Act of 1924 is not taxable at its full value under the Federal estate tax levied by the Revenue Act of 1924.

XI.

The Court erred in holding that under the Revenue Act of 1924 only one-half of the value of property owned by the decedent and his wife as joint tenants, where the joint tenancy had been created prior to the enactment of the Revenue Act of 1924, was subject to the Federal estate tax.

XII.

The Court erred in granting a judgment to the plaintiff and against the defendant.

Wherefore, defendant and appellant prays that the judgment made and entered by the District Court herein be re-

versed and that the cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiff's complaint, and that defendant be given such other and further relief as to the Court may seem just and proper.

99 Dated this 14th day of September, 1937.

M. L. Igoe,

Michael L. Igoe,

United States Attorney.

David L. Bazelon,

David L. Bazelon,

Assistant United States Attorney.

Entered Sept.
14, 1937.

92 And afterwards, to wit, on the 14th day of September, A. D. 1937 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge appears the following entry, to wit:

93 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—39407) * *

ORDER ALLOWING APPEAL.

This cause coming on to be heard on the petition of the United States of America, the said defendant appearing by its attorney, Michael L. Igoe, United States Attorney for the Northern District of Illinois, for an order allowing it to prosecute an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing that notice of this proceeding has been given to the plaintiff.

It Is Ordered in open court that the prayer of the said petitioner be and the same hereby is allowed, and the appeal prayed for by the said petitioner is hereby granted and allowed without bond of the defendant, it appearing that the above entitled cause is one in which the United States is the real party in interest, and this appeal is being taken by the direction and authority of the Attorney General of the United States of America.

Dated this 14 day of September, A. D. 1937.

Enter:

Barnes,
United States District Judge.

100 And on, to wit, the 27th day of September, A. D. 1937
came the Defendant by its attorneys and filed in the
Clerk's office of said Court a certain Praeipie for Record in
words and figures following, to wit:

Filed Sept.
1937.

101 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—39407) * *

PRAEIPIE FOR RECORD.

To: Henry W. Freeman, Esq., Clerk of the District Court of
the United States, Northern District of Illinois:

You will please prepare a transcript of the record in the
above-entitled cause to be filed in the office of the Clerk of
the United States Circuit Court of Appeals for the Seventh
Circuit under the appeal heretofore allowed in said cause,
and include in said transcript the following:

1. Placita.
2. Petition filed May 27, 1931.
3. Plea and Notice of Special Matter filed May 23, 1931.
4. Order granting petitioner leave to file instant
amended petition, entered January 15, 1934.
5. Amendment to petition filed January 15, 1934.
6. Stipulation of Facts filed April 14, 1937.
7. Defendant's request for Findings of Fact and Conclu-
sions of Law, filed May 24, 1937.
8. Memorandum of Judge Woodward filed June 10, 1937.
9. Findings of Fact and Conclusions of Law entered June
17, 1937.
- 101½ 10. Judgment entered for plaintiff on June 17, 1937.
11. Order that record show certain exceptions, en-
tered June 17, 1937.
12. Order extending time for filing bill of exceptions, en-
tered June 17, 1937.
13. Notice of Appeal.
14. Petition for Appeal.
15. Order allowing appeal.
16. Assignment of Errors.
17. Citation.
18. This Praeipie.
19. Clerk's Certificate.

M. L. Igoe (B)
Michael L. Igoe,
United States Attorney.

Service of a copy of the above praecipe acknowledged this 22 day of September A. D. 1937.

McCulloch, McCulloch & McLaren.

102 Northern District of Illinois } ss:
Eastern Division

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled

Elizabeth C. Jacobs, Executrix under the Last Will and Testa- ment of W. Francis Jacobs, de- ceased,	} No. 39407.
<i>vs.</i>	
The United States of America	

as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this _____ day of October, A. D. 1937.

Henry W. Freeman

(Seal)

Clerk.

103 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—39407) * *

CITATION.

The President Of The United States, To Elizabeth C. Jacobs, Executrix of the Last Will and Testament of W. Francis Jacobs, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Seventh Circuit to be holden at Chicago within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's office

in the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein you are plaintiff appellee, to show cause, if any there by, why the judgment entered against the said defendant appellant as in the said petition for appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John P. Barnes, Judge of the District Court of the United States, this 14th day of September, A. D. 1937.

John P. Barnes,
United States District Judge.

Served a copy of the above Citation this 14th day of September, A. D. 1937.

McCulloch, McCulloch & McLaren
Attorneys for Plaintiff.

104 Endorsed: In the District Court of the United States
• • (Caption—39407) • • Citation Filed Sep 14 1937
Henry W. Freeman, Clerk Michael L. Igoe, U. S. Atty.
(DLB)

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 85, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the eighteenth day of November, 1937, upon which the following entitled cause was heard and determined: Elizabeth C. Jacobs, Executrix of the Last Will and Testament of W. Francis Jacobs, deceased, Plaintiff-Appellee vs. The United States of America, Defendant-Appellant, No. 6418, October Term, 1937, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 15th day of September A. D. 1938.

[SEAL]

FREDERICK G. CAMPBELL,

*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the fifth day of October, 1937, of the October Term, in the year of our Lord one thousand nine hundred and thirty-seven, and of our Independence the one hundred and sixty-second.

6418

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL AND TESTAMENT
OF W. FRANCIS JACOBS, DECEASED, PLAINTIFF-APPELLEE

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division

And, to wit: On the twenty-fifth day of May 1938, the following further proceedings were had and entered of record, to wit:

Wednesday, May 25, 1938

Court met pursuant to adjournment

Before Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge.

6418

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL AND TESTAMENT
OF E. FRANCIS JACOBS, DECEASED, PLAINTIFF-APPELLEE

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and briefs of counsel and on oral argument by Mr. Ellis N. Slack, counsel for Appellant, and by Mr. Lewis C. Murtaugh, counsel for Appellee, and the Court having heard the same, takes this matter under advisement.

And afterwards, to wit: On the twenty-eighth day of June, 1938, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh
Circuit

No. 6418. October Term, 1937, April Session, 1938

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL AND TESTAMENT
OF W. FRANCIS JACOBS, DECEASED, PLAINTIFF-APPELLEE

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

June 28, 1938

Before SPARKS and MAJOR, Circuit Judges, and LINDLEY, District Judge.

LINDLEY, District Judge. On July 29, 1909, prior to the enactment of any legislation including joint tenancies in the gross estate upon which an estate tax is to be computed and payable, Jacobs purchased, with his own funds, certain real estate of the value of \$19,000. Con-

veyance was made to him and his wife as joint tenants. Upon his death, on June 17, 1924, the commissioner included in his gross estate the entire value of the property. The executors paid the tax under protest and sued to recover; the District Court allowed a recovery of 50 per cent thereof. The sole question presented by the appeal is whether the commissioner rightfully included within the estate of Jacobs, the entire value of this property.

The first provision for inclusion of such transfers in the computation of an estate tax was enacted in 1916, some seven years subsequent to the acquisition of the property. It provided that there should be included in the value of the gross estate of the decedent, at the time of his death, all interest in real estate held as joint tenants by the decedent and any other person or as tenants by the entirety by the decedent and his spouse, except such part thereof as might be shown to have belonged originally to such other person and not to have been received or acquired by the latter from the decedent for less than a fair consideration. This provision has been carried forward in the applicable act. (Revenue Act of 1924, c. 234, 43 Stat. 253.) Prior to 1924 there was no express provision that the provision should apply to transfers made before enactment of the legislation, but by Section 302 (h) of the act of 1924, Congress provided that such property should be included, irrespective of whether the transfer occurred prior or subsequent to the enactment.

In *Tyler v. United States*, 281 U. S. 497, the Supreme Court in dealing with an estate by the entirety, created out of funds contributed solely by the decedent, subsequent to the first legislation including such transfers, held the full value of the estate taxable. The court pointed out that in such estates, each of the decedent and the spouse has the right to possess and use the whole property but that neither is able to dispose of any part thereof without the consent of the other; that, according to an "amiable fiction" of the common law (abiding in Pennsylvania, and Maryland), husband and wife are but one person and their estate by the entirety constitutes a unit; and, therefore, that the title of the survivor becomes effective as against the other only at and because of the latter's death, saying "the death of one of the parties to the tenancy became the generating source of important and definite accessions to the property rights of the other." In *Gwinn v. Commissioner*, 287 U. S. 224, the court followed the *Tyler* case, approving the inclusion of one-half of an estate in joint tenancy under the law of California, under which the rights of the survivor of two joint tenants are not irrevocably fixed at the creation of the tenancy. But the only amount included in the assessment there before the court was the one-half of the joint estate. On February 7, 1938, the Supreme Court decided *Helvering v. Bowers*, 303 U. S. —, and *Foster v. Commissioner*, 303, U. S. —. The *Bowers* case had to do with an attempt to include the full value of an estate held by the entirety created prior to 1916 and the *Foster* case with a similar attempt as to the full

value of an estate by joint tenancy created after 1916. In each instance the entire value of the property was held properly included.

An estate of entirety differs from that of joint tenants. In Illinois, where the property involved was located, a joint tenant has a right to sell his interest. *Lawler v. Byrne*, 252 Ill. 194; *Szymczak v. Szymczak*, 306 Ill. 541. He may mortgage it or subject it to a lien. *Hardin v. Wolf*, 318 Ill. 48; *Liese v. Hentze*, 326 Ill. 633. He may sue for partition. *Barr v. Barr*, 273 Ill. 621. Illinois does not know estates by the entirety. In such estates the title of each grantee is to the whole and no act of the one can destroy or affect the right of survivorship in the other. When the one dies, he merely ceases to divide the enjoyment of the estate of which he was completely seized by virtue of the creative instrument. On the other hand the title of each joint tenant is to a share of the estate only. If one dies, the survivor becomes seized of the whole. But the creative instrument gives him title to only his share and the share which he receives as a result of the death of his co-tenant is a new one. Co-tenants possess the incidents of enjoyment such as sale, mortgage, lease, and partition, *U. S. v. Robertson*, 183 Fed. 711 (C. C. A. 7), c. d. 220 U. S. 616. This distinction must be kept in mind, for it affects vitally the question before us.

In *Knox v. McElligott*, 258 U. S. 546, a husband and wife in 1912 acquired certain property as joint tenants purchased solely with the funds of the husband. He died in 1917, and a tax was assessed upon the entire value of the property owned by him and his wife as joint tenants. There as here the taxpayer paid the tax under protest and sued to recover, the District Court rendering judgment as prayed, allowing the tax upon half of the property and not upon the other half. The Circuit Court of Appeals reversed the judgment holding the entire estate taxable, but the Supreme Court reversed the latter court, saying: "The Circuit Court of Appeals stating the contention of the executors said, that 'they claimed that the assessment was void as to the half of the joint property which vested in Cornelia (Mrs. Kissam) before the passage of the Act of September 8, 1916, as amended, and also that the act itself was unconstitutional as a direct tax upon property without apportionment among the several states as required by Article I, Sec. 9, subdivision 4, of the Constitution.'

"But this contention was the alternative of the contention which plaintiffs in error also made, that the Act of September 8, 1916, as amended, was not intended to have retrospective operation. And this was the decision of the District Court, the court saying, 'It is true that section 201 provides that the tax is imposed upon the transfer of the net estate of 'every decedent dying after the passage of this Act'; but the assumption must be that this relates to estates thereafter created and not to then existing vested property.' And the court added 'At the time the statute was passed Cornelia Kissam's interest belonged to her.' The court further observed, 'From the structure of the Act, to say that the measure of the tax is the extent

of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control.' The court rejected that conclusion and denied to the acts of Congress retroactive operation. To this the Circuit Court of Appeals was opposed and reversed the judgment based upon it.

"It will be observed, therefore, that this case involves the same question as that decided in *Shwab v. Doyle*, ante, 529, and on the authority of that case the judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings in accordance with this opinion."

Subsequent thereto the *Tyler* case, dealing with estates by the entirety, was decided, but still later in *Cahn, Executor, v. United States*, 297 U. S. 691, the Supreme Court adhered to *Knox v. McElligott*, supra, and reversed the Court of Claims, whose decision is published in 10 F. Supp. 577. The lower court held that the entire value of joint tenancy property should be included. The Supreme Court reversed, upon the authority of the *Knox* case. That case seems parallel with the present case as to the facts and must control our decision here.

We conclude that Mrs. Jacobs received title to her interest in 1902; that when the statute was enacted, a half-interest already belonged to her and that Congress could not by legislation thereafter include in her husband's estate something that had passed to her as her absolute property years before the legislation was enacted. *Helvering v. Bowers*, in our opinion, does not militate against this conclusion, in view of the *Knox* and *Cahn* cases.

Nor in our opinion can the provision of the statute making it applicable to estates created prior to the enactment of the legislation affect the situation. This section cannot be applied to a completed transfer of title existing before the tax provision was enacted. *Helvering v. Helmholz*, 296 U. S. 93; *Nichols v. Coolidge*, 274 U. S. 531; *Hassett v. Welch*, — U. S. —. Thus in *Industrial Trust Company v. United States*, 296 U. S. 220, the court held that the statute was not applicable to the proceeds of insurance policies irrevocably assigned prior to 1916. See also *Lewellyn v. Frick*, 268 U. S. 238, to the same effect.

The property interest of Mrs. Jacobs was created prior to the enactment of the legislation, prior to the time when she and her husband had knowledge that Congress expected to attempt to reach such transfers. At such a time her estate was created, and under it she obtained a vested property right. The other half interest, which she did not receive until the death of her husband, was property taxable, but to say that Congress by legislation subsequent to the creation of a vested estate, may tax the transfer retroactively is opposed to all the reasoning in the cases cited.

Nor does the decision of the Supreme Court in the case of *Commissioner v. Foster* persuade us to a different conclusion. The joint

tenancy there under consideration and held taxable was one created in 1931, long subsequent to the enactment of the legislation. There was no question of the retroactive effect of the act. *Gwinn v. Commissioner*, 287 U. S. 224, cited in the Foerster opinion, sustained the inclusion only of the half of an estate in joint tenancy represented by the decedent's interest, created before 1916. This half interest the court said passed at his death, and, therefore, was properly taxable. There was there no attempt to tax the interest which had passed to his wife prior to the enactment of the legislation. The same is true of the joint tenancy estate under consideration in *Commissioner v. Emery*, 62 F. (2) 591 (C. C. A. 7). There the joint tenancy was created subsequently to the passage of the act.

In consideration, therefore, of our conclusion that the interest of Mrs. Jacobs vested in her prior to the enactment of the legislation, the District Court was right in its judgment excluding that half interest from taxation. The only part properly taxable was the remainder of the estate which passed to her upon the death of her husband.

The taxpayer admits that under *Foster v. Commissioner* the question involved as to the joint tenancy created in 1917 was erroneously decided.

The judgment of the District Court is reversed in so far as it applies to the property known as the Monticello Avenue property and as to the Humboldt Boulevard property, it is affirmed.

And on the same day, to-wit: On the twenty-eighth day of June 1938 the following further proceedings were had and entered of record, to-wit:

Tuesday, June 28, 1938

Court met pursuant to adjournment

Before Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge.

6418

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL AND TESTAMENT
OF W. FRANCIS JACOBS, DECEASED, PLAINTIFF-APPELLEE

vs.

THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the
Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the Judgment of the said District Court in this

cause be, and the same is hereby reversed in so far as it applies to the property known as the Monticello Avenue Property, and that said Judgment be, and the same is hereby, affirmed as to the Humboldt Boulevard Property.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court.

And afterwards, to-wit: On the twenty-fifth day of July 1938 the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

United States Circuit Court of Appeals for the Seventh Circuit

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages, numbered from 1 to 11, inclusive, contain a true copy of the following proceedings had and papers filed, hearing May 25, 1938, opinion filed June 28, 1938, judgment entered June 28, 1938, and reference to the issuance of the Mandate, in the following entitled cause: Elizabeth C. Jacobs, Executrix of the Last Will and Testament of W. Francis Jacobs, deceased, Plaintiff-Appellee, vs. the United States of America, Defendant-Appellant, No. 6418, October Term, 1937, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 15th day of September A. D. 1938.

[SEAL]

FREDERICK G. CAMPBELL,

*Clerk of the United States Circuit Court of Appeals
for the Seventh Circuit.*


Supreme Court of the United States

Order allowing certiorari

Filed November 7, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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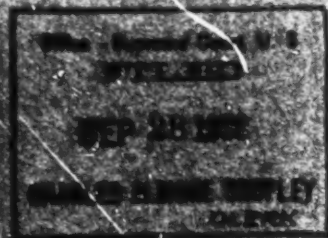
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No. 881

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, PETITIONER

**ELIZABETH O. JACOB, EXECUTRIX OF THE LAST WILL
AND TESTAMENT OF W. FRANK JACOB, DECEASED**

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 391

THE UNITED STATES OF AMERICA, PETITIONER

v.

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL
AND TESTAMENT OF W. FRANCIS JACOBS, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on June 28, 1938.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 70-75) is unreported. The opinion of the Circuit Court of Appeals (R. 88-92), is reported in 97 F. (2d) 784.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 28, 1938 (R. 92). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the Revenue Act of 1924, the value of property acquired by the decedent and his wife (who survived him) as joint tenants prior to the enactment of the Revenue Act of 1916 may be included in his gross estate to the extent that he furnished the purchase price therefor.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 13-18.

STATEMENT

The facts were stipulated (R. 12-15) and were found as stipulated (R. 71-74). They may be summarized as follows:

On June 17, 1924, W. Francis Jacobs predeceased his wife Elizabeth C. Jacobs (R. 71). At the time of his death they owned as joint tenants two pieces of real estate in Chicago, Illinois. The first parcel, situated on Humboldt Boulevard, was acquired by them on July 29, 1909 (R. 73-74), and the second, situated on Monticello Avenue, was acquired by them on November 23, 1917, subject, however, to an encumbrance of \$17,000¹ (R. 73).

¹ A deduction from the gross estate on account of such encumbrance was duly allowed. It was stipulated that, if the Monticello Avenue property should be excluded from the

With respect to the first parcel, the Commissioner determined that its value at the time of the decedent's death was \$19,000 and that the funds used in its purchase were entirely those of the decedent. Hence he included the entire value in the gross estate (R. 73-74).

With respect to the second parcel, he found that the decedent had contributed fifteen-sixteenths and his wife one-sixteenth of its price. He determined that its value at the time of decedent's death was \$65,000 and included fifteen-sixteenths thereof, or \$60,937.50, in the gross estate (R. 73).

As a result of such inclusions, he determined that there was a deficiency in the estate tax of \$1,796.23, and that the undischarged part of this was \$1,347.17, which with interest in the sum of \$148.18 made a total of \$1,495.35. The respondent, as executrix of the decedent's estate, paid the deficiency and duly filed a claim for refund, which was allowed to the extent of \$7.48 and rejected as to the balance (R. 72). The respondent thereupon brought this suit to recover such balance ² (R. 2-9).

The sole question presented to the District Court related to the Commissioner's inclusion of the value of the two parcels of property in the decedent's

decedent's statutory gross estate, the amount of the deduction should be reduced by \$16,060.47 and the recovery of the respondent reduced accordingly (R. 74).

² The claim for refund (R. 56) and the petition (R. 9) seek to recover, respectively, \$1,800.00 and \$1,903.70. It is not disclosed how these figures are arrived at.

gross estate. That court held that the tax could be measured only by the value of the decedent's interest which passed at death and not by the value of the whole interest, which would include the value of the interest of the surviving tenant; also that the 1924 Act could not be given retroactive operation (R. 70). It therefore concluded that the tax on the estate of the deceased joint tenant could properly be measured only by one-half (the decedent's half) of the property held by them as joint tenants; and, so far as the Humboldt Boulevard property was concerned, that the Revenue Act of 1924 could not be given retroactive operation so as to tax more than one-half of the property to the decedent's estate. The court concluded that the respondent was entitled to judgment in the principal sum of \$502.55 plus \$306.24 interest, or a total of \$808.79² (R. 75). Judgment in that amount was accordingly entered (R. 75-76). The Government appealed (R. 77).

In the court below the petitioner admitted that under the decision of this Court in *Foster v. Commissioner*, 303 U. S. 618, the question involved as to the joint tenancy created in 1917, in the Monticello Avenue property, was erroneously decided by the District Court, and hence it reversed the judgment of the District Court. On the other hand, it affirmed the judgment of the District Court insofar

² The record does not disclose how the court arrived at the \$502.55 figure.

as it applied to the Humboldt Boulevard property which was acquired in joint tenancy prior to the 1916 Act."

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in holding:

1. That the estate tax imposed by Section 302 (e) of the Revenue Act of 1924 may not be measured by the entire value of property acquired in joint tenancy by the decedent and his wife prior to the enactment of the Revenue Act of 1916, even though the decedent furnished the entire consideration for its acquisition.
2. That Section 302 (e) of the Revenue Act of 1924, as applied in the circumstances of this case, with respect to the Humboldt Boulevard property, is unconstitutional.
3. That the value of only one-half (the decedent's half) of that property was includible in his gross estate.
4. In affirming the judgment of the District Court insofar as it relates to that property.

REASONS FOR GRANTING THE WRIT

Section 302 (e) of the Revenue Act of 1924 requires the inclusion in the gross estate of the value at the time of the decedent's death of all property to the extent of his interest therein held, *inter alia*, as joint tenant. It further provides however, that where such property or any part thereof, or part of the consideration with which such property

was acquired, is shown to have been at any time acquired by the other tenant from the decedent for less than a fair consideration in money or money's worth, there shall be excepted from the value of the property only such part of the value of such property as is proportionate to the consideration furnished by such other person. So far as material here, subdivision (h) provides that subdivision (e) shall apply to estates, interests, and rights made, created, arising, or existing before or after the enactment of the 1924 Act.

The property here in question was purchased entirely with funds of the decedent (R. 74). In affirming the District Court's judgment in respect of that property, the court below decided (R. 91) that, where the joint interest of the decedent and wife in Illinois real estate was created *prior* to the passage of the Revenue Act of 1916, only one-half of the value thereof could validly be included in the gross estate, notwithstanding that the jointly owned property was purchased by the decedent entirely with his own funds. This conclusion was reached because the court considered that, in respect of such joint tenancies, Congress did not have the power to give the Act retroactive operation.

1. This decision of the court below conflicts in principle with *Tyler v. United States*, 281 U. S. 497; *Third National Bank & Trust Co. v. White*, 287 U. S. 577; *Helvering v. Bowers*, 303 U. S. 618; and *Foster v. Commissioner*, 303 U. S. 618, and creates an artificial hiatus in the law of estate taxation.

The cited cases establish that the full value of property, to the extent the consideration for its purchase was furnished by decedent, can be included in his gross estate if at his death it be held: in a tenancy by the entirety created after the enactment of the 1916 Act (*Tyler case*⁴); in a joint tenancy created after the 1916 Act (*Foster case*⁵); or in a tenancy by the entirety created before the 1916 Act (*Third National* and *Bowers cases*⁶). It would produce a surprising asymmetry in the Revenue Acts if a joint tenancy created before the enactment of the 1916 Act should alone be removed from the full reach of the estate tax.⁷

In *Gwinn v. Commissioner*, 287 U. S. 224, one-half of the value of property held in a joint tenancy created before 1916 was held properly included in the gross estate of the decedent, who had contributed one-half of the purchase price. This was the full measure of the statutory requirement,

⁴ To the same effect see *Phillips v. Dime Trust & S. D. Co.*, 284 U. S. 160.

⁵ To the same effect see *Bushman v. United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756; *O'Shanghessy v. Commissioner*, 60 F. (2d) 235 (C. C. A. 6th), certiorari denied, 288 U. S. 605; *Commissioner v. Emery*, 62 F. (2d) 591 (C. C. A. 7th).

⁶ To the same effect see *Robinson v. Commissioner*, 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Bushman v. United States*, *supra*; *Lery's Estate v. Commissioner*, 65 F. (2d) 412 (C. C. A. 2d); *Putnam v. Burnet*, 63 F. (2d) 456 (App. D. C.).

⁷ In *Dimock v. Corwin*, 19 F. Supp. 56 (E. D. N. Y.) the full value of a joint tenancy created prior to 1916 was held includible in the gross estate.

since the decedent had contributed only one-half of the purchase price. However, the case cannot be said to be unequivocal authority for including the full value of property purchased by the decedent alone.

The departure of the court below from the decisions of this Court is made clearer when the *per curiam* decisions in the *Bowers* and *Foster* cases are examined more closely. In the *Bowers* case the Court sustained the inclusion in the gross estate of the full value of estates held by the entirety and created prior to 1916; this decision was solely on the authority of the *Tyler* case, which considered an estate by the entirety created after 1916. The *Tyler* case was thus expanded, as it was in the *Third National* case, to a decision that the full value of a tenancy by the entirety is taxable, no matter when created. In the *Foster* case the Court sustained the inclusion in the gross estate of the full value of a joint estate created after 1916; both the *Tyler* and *Gwinn* cases were cited as authority. Thus, the *Tyler* case was held applicable to a joint tenancy and the *Gwinn* case was held applicable to the full value of a joint tenancy. Both the *Tyler* case (as applied in the *Bowers* case) and the *Gwinn* case (as applied to the one-half of the estate contributed by the decedent) are equally applicable to estates created prior to 1916. It seems necessarily to follow that the full value of a joint tenancy created prior to 1916, as well as one created thereafter, may be included in the gross estate.

2. The court below seems to have departed from the plain implications of these decisions of this Court in part because of the decisions in *Knox v. McElligott*, 258 U. S. 546, and *Cahn v. United States*, 297 U. S. 691, and in part because of the characteristics of a joint tenancy under Illinois law (R. 90-91). Neither ground supports the conclusion reached.

The *Knox* case arose under the 1916 Act and the *Cahn* case under the 1918 Act. Neither contains retroactive provisions. In the *Knox* case this Court held that the 1916 Act could not be given retroactive application on the authority of *Shwab v. Doyle*, 258 U. S. 529, which in turn held that the contemplation of death section of the statute could not be given retroactive application in the absence of an express provision of the statute showing it to be the intention of Congress to do so. The *Cahn* case was decided *per curiam* on the authority of the *Knox* case. Accordingly, neither decision is applicable to the Revenue Act of 1924.* See Section 302 (h), *infra*, p. 14.

The court below differentiated estates by the entirety (which it said did not exist in Illinois) from estates of joint tenancy under the Illinois law, on

* *Griswold v. Helvering*, 290 U. S. 56, not relied on by the court below, involved the Revenue Act of 1921, which similarly contained no provision comparable to Section 302 (h) of the 1924 Act. The Commissioner, in deference to the ruling in the *Knox* case, sought only to include one-half of the value of a joint tenancy created before the 1916 Act and was sustained by this Court.

the ground that in estates by the entirety the title of each grantee is to the whole and no act of the one can destroy or affect the survivorship of the other, and that when one dies, he merely ceases to divide the enjoyment of the estate of which he was completely seized by virtue of the creative instrument; whereas a joint tenant under the Illinois law has the right to sell his interest or to mortgage it or to subject it to a lien, and that he could sue for partition. Under the Illinois law the title of each joint tenant was said to be to a share of the estate only.

If by thus differentiating between estates by the entirety on the one hand, and joint estates under the Illinois law on the other, the court below intended to imply that Illinois joint tenancies differ from joint tenancies at common law or in other states, we submit such implication is wholly unjustified. It is not questioned that the Illinois statute, which was approved June 30, 1919, L. 1919, p. 633 (Appendix, *infra*, p. 17), specifically provides for the creation of joint tenancies in real estate. It appears to be well settled in Illinois that a joint tenancy under the Illinois statutes has all of the common-law attributes of such tenancies.⁹ It will

⁹ The last expression of the Supreme Court of Illinois on the subject is its decision in the case of *Deslauriers v. Sene-sac*, 331 Ill. 437, where the court said (p. 440):

"An estate in joint tenancy can only be created by grant or purchase—that is, by the act of the parties. It cannot arise by descent or act of law. The properties of a joint estate are derived from its unity, which is fourfold: the unity

be noted that the present statute is but a reenactment of the Act of June 26, 1917 (see Appendix, *infra*, p. 18). A full exposition of the history of the 1917 Act and its meaning is found in *Svenson v. Hanson*, 289 Ill. 242, which expressly follows *Mette v. Feltgen*, 148 Ill. 357, 367, decided under the prior law. In the last mentioned case the court held that, upon the death of the wife, the estate in the property held in joint tenancy with her husband passed not to her heirs by inheritance but to the husband by survivorship. The basis of the decision is that the Illinois statute permits "parties to create the common law estate of joint tenancy, with its common law incidents, by expressly declaring in a deed running to two or more grantees, that the estate conveyed shall pass, not in tenancy in common, but in joint tenancy." Cf. *Lawler v. Byrne*, 252 Ill. 194, 197; *Liese v. Hentze*, 326 Ill. 633, 637. There appears, therefore, to be no basis for making a distinction between a joint tenancy under the California law, for example, considered in the *Foster* case, *supra*, and a joint tenancy under the Illinois law. The tax incidents are the same in both cases.

of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession. 1 Sharswood's Blackstone's Com. book 2, p. 180; Freeman on Cotenancy and Partition (2d ed.), sec. 11; 1 Washburn on Real Prop. (6th ed.), sec. 855; 7 R. C. L. p. 811; *Gaunt v. Stevens*, 241 Ill. 542."

If, on the other hand, the decision of the court below were intended to be a holding that joint tenancies generally, at common law or under the ordinary statutes, were of a nature such that the full value of the estate, when created prior to 1916, even though acquired through the contributions of the decedent alone, could not be reached under the estate tax laws, it seems with equal clarity to be in error. The *Tyler* case was the ground of decision in the *Gwinn* case and, together with the latter decision, was the authority for the decision in the *Foster* case. If tenancies by the entirety are substantially indistinguishable for estate tax purposes from joint tenancies when dealing with joint tenancies created after the 1916 Act, or when dealing with joint tenancies created before 1916 where the decedent contributed only one-half of the purchase price, no reason appears why they should be differentiated in the case at bar.

3. The decision of the court below raises new doubts in a field of estate tax law which had been thought finally to have been clarified by the decisions of this Court. The Treasury Department advises that the principle involved is important in the administration of the estate tax.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

SEPTEMBER 1938.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the

value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Treasury Regulations 68, promulgated under the Revenue Act of 1924:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of

administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion*.—The entire value of such property is *prima facie* a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner

from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate.

(4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative:

(a) Where the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire value of the property should be included; (d) where the other

joint owner, prior to the acquirement of the property, received from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Smith-Hurd Revised Statutes, Illinois, 1935,

c. 76:

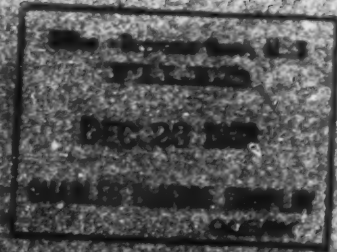
AN ACT to revise the law in relation to joint rights and obligations (Approved June 30, 1919. L. 1919, p. 633)

1. JOINT TENANCY DEFINED. § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly: That* no estate in joint tenancy in any lands, tenements or hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever heretofore or hereafter made, other than to executors and trustees unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy; and every such estate other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common and that all conveyances heretofore made, or which hereafter may be made, wherein the premises therein

mentioned were or shall be expressly declared to pass not in tenancy in common but in joint tenancy, are hereby declared to have created an estate in joint tenancy with the accompanying right of survivorship the same as it existed prior to the passage of an Act entitled: "An Act to amend section 1 of an Act entitled: 'An Act to revise the law in relation to joint rights and obligations,' approved February 25, 1874, in force July 1, 1874," approved June 26, 1917, in force July 1, 1917.



FILE COPY



No. 391

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, PETITIONER

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL
AND TESTAMENT OF W. FRANCIS JACOBS, DECEASED

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES



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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (R. 70-75) is unreported. The opinion of the Circuit Court of Appeals (R. 88-92), is reported in 97 F. (2d) 784.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 28, 1938 (R. 92). The petition for certiorari was filed September 28, 1938, and certiorari was granted on November 7, 1938.

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the Revenue Act of 1924, the value of property acquired by the decedent and his wife (who survived him) as joint tenants prior to the enactment of the Revenue Act of 1916 may be included in his gross estate to the extent that he furnished the purchase price therefor.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 18-23.

STATEMENT

The facts were stipulated (R. 12-15) and were found as stipulated (R. 71-74). They may be summarized as follows:

On June 17, 1924, W. Francis Jacobs predeceased his wife Elizabeth C. Jacobs (R. 71). At the time of his death they owned as joint tenants two pieces of real estate in Chicago, Illinois. The first parcel, situated on Humboldt Boulevard, was acquired by them on July 29, 1909 (R. 73-74), and the second, situated on Monticello Avenue, was acquired by them on November 23, 1917, subject, however, to an encumbrance of \$17,000 (R. 73).

With respect to the first parcel, the Commissioner determined that its value at the time of the

decedent's death was \$19,000 and that the funds used in its purchase were entirely those of the decedent. Hence he included the entire value in the gross estate (R. 73-74).

With respect to the second parcel, he found that the decedent had contributed¹ fifteen-sixteenths and his wife one-sixteenth of its price. He determined that its value at the time of decedent's death was \$65,000 and included fifteen-sixteenths thereof, or \$60,937.50, in the gross estate (R. 73).

As a result of such inclusions, he determined that there was a deficiency in the estate tax of \$1,796.23, and that the undischarged part of this was \$1,347.17, which with interest in the sum of \$148.18 made a total of \$1,495.35. The respondent, as executrix of the decedent's estate, paid the deficiency and duly filed a claim for refund, which was allowed to the extent of \$7.48 and rejected as to the balance (R. 72). The respondent thereupon brought this suit to recover such balance¹ (R. 2-9).

The sole question presented to the District Court related to the Commissioner's inclusion of the value of the two parcels of property in the decedent's gross estate. That court concluded that the tax on the estate of the deceased joint tenant could properly be measured only by one-half of the property held by them as joint tenants; and, so far as the

¹ The claim for refund (R. 56) and the petition (R. 9) seek to recover, respectively, \$1,800.00 and \$1,903.70. It is not disclosed how these figures are arrived at.

Humboldt Boulevard property was concerned, that the Revenue Act of 1924 could not be given retroactive operation so as to tax more than one-half of the property to the decedent's estate (R. 75). The court concluded that the respondent was entitled to judgment in the principal sum of \$502.55 plus \$306.24 interest, or a total of \$808.79² (R. 75). Judgment in that amount was accordingly entered (R. 75-76). The Government appealed (R. 77).

On appeal, the petitioner admitted that under the decision of this Court in *Foster v. Commissioner*, 303 U. S. 618, the question involved as to the joint tenancy created in 1917, in the Monticello Avenue property, had been erroneously decided by the District Court. The Circuit Court of Appeals in this respect reversed the judgment of the District Court. On the other hand, it affirmed the judgment of the District Court insofar as it applied to the Humboldt Boulevard property which was acquired in joint tenancy prior to the 1916 Act.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred in holding:

1. That the estate tax imposed by Section 302 (e) of the Revenue Act of 1924 may not be measured by the entire value of property acquired in joint tenancy by the decedent and his wife prior to the enactment of the Revenue Act of 1916, even

² The record does not disclose how the court arrived at the \$502.55 figure.

though the decedent furnished the entire consideration for its acquisition.

2. That Section 302 (e) of the Revenue Act of 1924, as applied in the circumstances of this case, with respect to the Humboldt Boulevard property, is unconstitutional.

3. That the value of only one-half of that property was includible in his gross estate.

4. In affirming the judgment of the District Court insofar as it relates to that property.

SUMMARY OF ARGUMENT

The express language of the Revenue Act of 1924, Sections 302 (e) and 302 (h), requires the inclusion in the gross estate of the full value of the property, purchased entirely with funds of the decedent, held in joint tenancy, though the joint tenancy was created prior to the Revenue Act of 1916, which first provided for the inclusion in the gross estate of the full value of such joint tenancy. This application of the statute is not unconstitutional.

- *Tyler v. United States*, 281 U. S. 497, upheld the inclusion in the gross estate of the full value of property held in tenancy by the entirety because of the ripening of the rights of the survivor in the whole estate upon the death of the other party to the tenancy. Similarly with respect to a joint tenancy, there also exists a right of survivorship, and the death of one party eliminates his right to take by

survivorship and ripens for the first time the rights of the survivor in to ownership of the whole estate, making appropriate the imposition of an estate tax upon the full value of the joint tenancy. This Court so held in *Foster v. Commissioner*, 303 U. S. 618, relying on the *Tyler* case.

Nor is the statute unconstitutionally retroactive as applied to tenancies created prior to 1916. This Court has so held with respect to tenancies by the entirety. *Helvering v. Bowers*, 303 U. S. 618, relying solely on the *Tyler* case. And since the *Tyler* case applies as well to joint tenancies (*Foster v. Commissioner, supra*), the statute constitutionally embraces joint tenancies created prior to 1916. The cessation of the decedent's right to survivorship and the ripening of the survivor's ownership upon the death of the decedent which warrants the inclusion in the gross estate of the full value of joint tenancies created after 1916 (*Foster v. Commissioner, supra*) warrants the inclusion of the full value of joint tenancies created prior to 1916. *Dimock v. Corwin* (C. C. A. 2d), decided November 7, 1938.

The court below erroneously relied upon *Knor v. McElligott*, 258 U. S. 546, and *Gahn v. United States*, 297 U. S. 691, which arose respectively under the 1916 and 1918 Acts, which contained no retroactive provisions.

The court below also stated that unlike a party to a tenancy by the entirety (which it said did not exist in Illinois) the title of each joint tenant is to a share of the estate only. If this is an implication that joint estates under the Illinois law differ from joint estates at common law it is wholly unjustified. The Illinois decisions make it abundantly clear that these have all the attributes of common law joint tenancies. Hence the decision of the lower court necessarily rests entirely upon a misconception of the basis of the tax, which is the cessation as the result of the death of one of the joint tenants of his right to take the whole by survivorship and the accession on the part of the surviving tenant of the title to the whole.

ARGUMENT

The applicable statute is the Revenue Act of 1924, Section 302 (e) of which, so far as material here, requires the inclusion in the gross estate of the decedent of the value at the time of the decedent's death of all property to the extent of the interest therein held as joint tenants by the decedent and any other person, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth. So far as material here, subdivision (h) provides that sub-

division (e) shall apply to estates, interests and rights made, created, arising, or existing before or after the enactment of the 1924 Act.

The property here in question was purchased entirely with funds of the decedent. (R. 74.) In affirming the District Court's judgment in respect of that property, the court below decided (R. 91) that where the joint interest of the decedent and wife in Illinois real estate was created *prior* to the passage of the Revenue Act of 1916, only one-half of the value thereof could validly be included in the gross estate, notwithstanding that the jointly owned property was purchased by the decedent entirely with his own funds, because, in respect of joint tenancies, Congress did not have the power to give the Act retroactive operation.

The decision below is contrary to the principles settled by the decisions of this Court. In *Tyler v. United States*, 281 U. S. 497, the Court permitted the taxation of the full value of a tenancy by the entirety (created after 1916), where the decedent had furnished the money for the purchase of the property held by himself and the surviving spouse. The Court posed, as the decisive question (p. 503):

* * * whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result * * * to be measured, in whole or in part, by the value of such rights.

The Court concluded (p. 504) that the death of one of the parties to the tenancy "became the 'generating source' of important and definite accessions to the property rights of the other" and that it was not arbitrary to include in the gross estate the value of property which came to the tenancy as a pure gift from the deceased spouse, and which, as a consequence of his death, became the property solely of the survivor.

The decision of this Court in *Foster v. Commissioner*, 303 U. S. 618, permitting the taxation of the full value of a joint tenancy,³ on the authority of both the *Tyler* case and *Gwinn v. Commissioner*, 287 U. S. 224, shows that there is no distinction so far as taxability is concerned between estates held by the entirety and those held in joint tenancy.⁴ In either case the death of one party terminates his right of survivorship and ripens property rights

³ It is to be noted that the order of the Court granting certiorari in the *Foster* case, as disclosed by the Court's Journal of November 15, 1937, states that the review was "limited to the question whether the total value of the property held by the decedent and petitioner as joint tenants, as decided by the Circuit Court of Appeals, or only one-half thereof, should be included in the gross estate of the decedent for the purpose of the federal estate tax."

⁴ See to the same effect the decisions in *Commissioner v. Emery*, 62 F. (2d) 591 (C. C. A. 7th); *Dimock v. Corcin*, 19 F. Supp. 56 (E. D. N. Y.), affirmed by the Circuit Court of Appeals for the Second Circuit on November 7, 1938, not yet reported, but see 1938 Prentice-Hall-Federal Tax Service, vol. 1, par. 5.673; *O'Shaughnessy v. Commissioner*, 60 F. (2d) 235 (C. C. A. 6th), certiorari denied, 288 U. S. 605

so as to constitute the survivor the sole proprietor, and thus makes appropriate the imposition of an estate tax and the inclusion of the full value of the property of the tenancy. The differences between the tenancies, primarily the power of the joint tenant alone to sever the tenancy, were thus held immaterial in view of the decisive similarity—the incident of the right of survivorship. As the Government pointed out in its brief in the *Foster* case (Br. p. 9), upon the death of the decedent and because of it, the survivor of the joint tenancy, for the first time, became entitled to the exclusive possession, use and enjoyment of the whole property, as her own; then, and then only, did the survivor become assured of the power of disposing of the property by will. The decedent's death was the event which made the shifting of the full benefits of the ownership to his wife complete and effective, and relieved her of the possibility of losing the whole property by the survival of the decedent. See *Dimock v. Corwin*, 1938 Prentice-Hall Federal Tax Service, vol. 1, par. 5.673, at p. 5.1468, decided November 7, 1938 (C. C. A. 2d), now pending on certiorari, No. 482; *O'Shaughnessy v. Commissioner*, 60 F. (2d) 235, 237 (C. C. A. 6th), certiorari denied, 288 U. S. 605.

The court below distinguished the *Tyler* and *Foster* cases on the ground that in the instant case the joint tenancy was created in 1909, prior to the 1916 statute first providing for the inclusion of the

full value of such joint tenancy, and held that therefore only one-half of the property held in the tenancy could be included in the gross estate. But its decision in *Bowers v. Commissioner*, 90 F. (2d) 790 (C. C. A. 7th), taking exactly the same position with reference to estates by the entirety, was reversed *per curiam* in *Helvering v. Bowers*, 303 U. S. 618, which decided that the full value of estates held by the entirety created prior to 1916 is includible in the gross estate. In this connection it is to be observed that the *Bowers* decision was predicated solely on the authority of the *Tyler* case, which involved tenancies created after 1916, and thus made the *Tyler* case stand for the proposition that the full value of estates by the entirety is taxable no matter when the estate was created.⁵ And, since under *Foster v. Commissioner*, *supra*, the *Tyler* case is applicable to joint tenancies as well as tenancies by the entirety, it would seem plain that Congress may constitutionally tax the full value of joint tenancies, no matter when created.

The manifest basis of the *Bowers* decision is that the statute taxing the full estate was not unconsti-

⁵ To the same effect see *Third National Bank & T. Co. v. White*, 287 U. S. 577, and compare *Phillips v. Dime Trust & S. D. Co.*, 284 U. S. 160. Also see *Levy's Estate v. Commissioner*, 65 F. (2d) 412 (C. C. A. 2d); *Robinson v. Commissioner*, 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758; *Putnam v. Burnet*, 63 F. (2d) 456 (App. D. C.); *Bushman v. United States*, 8 F. Supp. 694 (C. Cls.), certiorari denied, 295 U. S. 756.

tutionally retroactive because the interest of the decedent pervaded the whole property and his entire interest ceased only at his death, which also perfected the interest of the survivor in the whole estate. In the case of a joint tenancy it also is true that the interest of the decedent pervades the whole property and ceases only at his death, which perfects the interest of the survivor in the whole estate. This is the premise which necessarily underlay the decision in *Foster v. Commissioner, supra*, permitting the taxation of the entire joint tenancy. It is, therefore, likewise true that it is not unconstitutional to impose a tax upon the full value of the joint tenancy when the decedent's interest and right of survivorship terminates and the survivor's interest in the whole estate ripens into sole ownership, i. e. upon the death of a tenant, even though the joint tenancy was created prior to 1916. As the Circuit Court of Appeals for the Second Circuit recently said in *Dimock v. Corwin, supra*:

If an event occurs at death which justifies a tax upon the whole value of the joint estate created after the statute, the same event will justify a tax upon the whole value of a joint estate created before the statute. * * * Congress has such power to legislate and require the inclusion of the whole value because the death of a joint tenant results in such a shifting of economic benefits in the entire property as to make appropriate a tax on that result measured by the value of the entire property. Therefore it is not ma-

terial that the joint tenancy was created prior to the first federal estate tax of 1916.

2. The court below seems to have departed from the plain implications of these decisions in part because of certain decisions of this Court, notably *Knox v. McElligott*, 258 U. S. 546, and *Cahn v. United States*, 297 U. S. 691. The *Knox* case arose under the 1916 Act and the *Cahn* case under the 1918 Act. Neither contains retroactive provisions. In the *Knox* case this Court held that the 1916 Act could not be given retroactive application on the authority of *Shwab v. Doyle*, 258 U. S. 529, which in turn held that the contemplation of death section of the statute could not be given retroactive application in the absence of an express provision of the statute showing it to be the intention of Congress to do so. The *Cahn* case was decided *per curiam* on the authority of the *Knox* case. Accordingly, neither decision is applicable to the Revenue Act of 1924.* (See Section 302 (h), *infra*, p. 19.) The other decisions cited by the court below likewise turn on questions of construction,⁷ or invalidate the

* *Griswold v. Helvering*, 290 U. S. 56, not relied on by the court below, involved the Revenue Act of 1921, which similarly contained no provision comparable to Section 302 (h) of the 1924 Act. The Commissioner, in deference to the ruling in the *Knox* case, sought only to include one-half of the value of a joint tenancy created before the 1916 Act and was sustained by this Court.

⁷ *Lewellyn v. Frick*, 268 U. S. 238; *Helvering v. Helmholz*, 296 U. S. 93; *Industrial Trust Co. v. United States*, 296 U. S. 220; *Hassett v. Welch*, 303 U. S. 303.

application of the statute to a transfer completed prior to enactment, so as to leave nothing (to pass at death,* a ruling inapplicable here where respondent's rights in the whole estate did not ripen until the death of the decedent. never to be granted

3. A last point remains, largely because of the ambiguity of the reference below to Illinois decisions in suggesting a distinction between tenancies by the entirety and joint tenancies. The court stated (R. 90) that a joint tenant under the Illinois statutes has the right to sell his interest (citing *Lawler v. Byrne*, 252 Ill. 194; *Szymczak v. Szymczak*, 306 Ill. 541); to subject it to a lien (citing *Hardin v. Wolf*, 318 Ill. 48; *Liese v. Hentze*, 326 Ill. 633), and to sue for partition (citing *Barr v. Barr*, 273 Ill. 621). It concluded that, whereas under estates by the entirety (which it said did not exist in Illinois) the title of each grantee is to the whole, not destructible by an act of the other, "On the other hand the title of each joint tenant is to a share of the estate only" (R. 90), citing its decision in *United States v. Robertson*, 183 Fed. 711, certiorari denied, 220 U. S. 616.

If by the foregoing the court below intended to imply that Illinois joint tenancies in real estate differ from such joint tenancies at common law or in other States, we submit such implication is wholly unjustified. It is not questioned that the Illinois statute, which was approved June 30, 1919, L. 1919,

* *Nichols v. Coolidge*, 274 U. S. 531; see *Helvering v. Helmholtz*, 296 U. S. at 97-98.

p. 633 (Appendix, *infra*, p. 22), specifically provides for the creation of joint tenancies in real estate. It is well settled in Illinois that a joint tenancy under the Illinois statutes has all of the common-law attributes of such tenancies.⁹ The last expression of the Supreme Court of Illinois on the subject is its decision in the case of *Deslauriers v. Senesac*, 331 Ill. 437, where the court said (p. 440):

An estate in joint tenancy can only be created by grant or purchase—that is, by the act of the parties.⁹ It cannot arise by descent or act of law. The properties of a joint estate are derived from its unity, which is fourfold, the unity of interest, the unity of title, the unity of time, and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. 1 Sharswood's Blackstone's Com. book 2, p. 180; Freeman on Co-tenancy and Partition, (2d ed.) sec. 11; 1 Washburn on Real Prop. (6th ed.) sec. 855; 7 R. C. L. p. 811; *Gaunt v. Stevens*, 241 Ill. 542.

See also *Gaunt v. Stevens*, 241 Ill. 542, 547, cited by the Illinois court, and *Partridge v. Berliner*, 325 Ill. 253.

⁹ The Married Woman's Act has abolished the common-law rule that a deed to a husband and wife creates in them a tenancy by the entirety, but a joint tenancy between them is governed by the rules applicable to all other joint tenancies. *Lawler v. Byrne*, *supra*.

It will be noted that the present Illinois statute is but a reenactment of the Act of June 26, 1917 (see Appendix, *infra*, p. 23). A full exposition of the history of the 1917 Act and its meaning is found in *Svenson v. Hanson*, 289 Ill. 242, which expressly follows *Mette et al. v. Feltgen*, 148 Ill. 357, 367, decided under the prior law. In the last mentioned case, the court held that, upon the death of the wife, no estate in the property held in joint tenancy by her and her husband passed to her heirs by inheritance but to the husband as surviving joint tenant by survivorship. The basis of the decision is that the Illinois statute permits "parties to create the common law estate of joint tenancy, with its common law incidents, by expressly declaring in a deed running to two or more grantees, that the estate conveyed shall pass, not in tenancy in common, but in joint tenancy." Cf. *Lawler v. Byrne*, *supra*, p. 197, and *Liese v. Henze*, *supra*, p. 637.

There appears, therefore, to be no basis for making a distinction between a joint tenancy under the California law, for example, considered in the *Foster* case, *supra*, and a joint tenancy under the Illinois law. The tax incidents are the same in both cases. Hence the decision of the lower court rests entirely upon a misconception of the basis of the tax, which is the cessation at and as a result of the death of one joint tenant of his right to take the whole by survivorship and the accession on the part of the surviving tenant of title to the whole

for the first time. As stated above, the principles already settled by decisions of this Court justify the inclusion in the gross estate of the full value of the estate held in joint tenancy.

CONCLUSION

It is therefore respectfully submitted that the decision of the court below should be reversed in so far as it holds that only one-half of the value of the Humboldt Boulevard property and not the whole thereof is includible in the decedent's gross estate.

ROBERT H. JACKSON,
Solicitor General.

JAMES W. MORRIS,
Assistant Attorney General.

SEWALL KEY,
CARLTON FOX,
A. F. PRESCOTT,

Special Assistants to the Attorney General.
DECEMBER 1938.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person

as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Treasury Regulations 68, promulgated under the Revenue Act of 1924:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. Taxable portion.—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the con-

sideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate.

(4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) Where the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire value of the property should be included; (d) where the other joint owner, prior to the acquirement of the property, received from the decedent, for less than a fair considera-

tion in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Smith-Hurd Revised Statutes, Illinois, 1935, c. 76:

AN ACT to revise the law in relation to joint rights and obligations. [Approved June 30, 1919. L. 1919, p. 633.]

1. JOINT TENANCY DEFINED.—§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That no estate in joint tenancy in any lands, tenements or hereditaments shall be held or claimed under any grant, devise or conveyance whatsoever heretofore or hereafter made, other than to executors and trustees unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy; and every such estate other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common and that all conveyances heretofore made, or which hereafter may be made, wherein the premises therein mentioned were or shall be expressly declared to pass not in tenancy in common but in joint tenancy, are hereby

declared to have created an estate in joint tenancy with the accompanying right of survivorship the same as it existed prior to the passage of an Act entitled: "An Act to amend section 1 of an Act entitled: 'An Act to revise the law in relation to joint rights and obligations,' approved February 25, 1874, in force July 1, 1874," approved June 26, 1917, in force July 1, 1917.

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 391

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

ELIZABETH C. JACOBS, Executrix of the Last Will
and Testament of W. FRANCIS JACOBS, Deceased,
Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

✓ HUGH W. McCULLOCH,
231 S. LaSalle St., Chicago, Ill.,
Counsel for Respondent.

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OPINIONS BELOW.

The memorandum opinion of the District Court (R. 70-75) is unreported. The opinion of the Circuit Court of Appeals (R. 88-92), is reported in 97 F. (2d) 784.

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JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 28, 1938 (R. 92). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether under the Revenue Act of 1924 the survivor's half of property acquired in joint tenancy prior to the enactment of the Revenue Act of 1916 may be included in the gross estate of the decedent who furnished the purchase price therefor.

STATUTE INVOLVED.

The statute involved is Revenue Act of 1924, c. 234, 43 Stat. 253:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate

to the consideration furnished by such other person:
Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

STATEMENT.

No statement of the case is necessary in addition to the statement set forth in the petition.

ARGUMENT.

1. The court below held (1) that Mrs. Jacobs acquired title to one-half of the joint tenancy real estate here in question upon the acquisition thereof in joint tenancy by Dr. and Mrs. Jacobs in 1909 and (2) that the half interest in this jointly owned real estate which Mrs. Jacobs had so acquired prior to the enactment of any Federal estate tax law was not subject to tax upon the death of Dr. Jacobs because such tax could only be imposed by giving an invalid retroactive construction to the Revenue Act of 1924.

In holding that Mrs. Jacobs acquired title to and control of one-half of the joint tenancy real estate upon the acquisition thereof in joint tenancy by Dr. and Mrs. Jacobs in 1909, the court below followed the settled law of Illinois as to the nature of the interests of joint tenants in jointly owned property as set forth in the Illinois cases cited in the opinion of the court and followed the law announced by this court as to the nature of such interests in the cases of *Knox v. McElligott*, 258 U. S. 546, and *Cahn v. U. S.*, 297 U. S. 691.

In holding that the half interest in this jointly owned real estate which Mrs. Jacobs acquired, owned, and enjoyed prior to the enactment of any Federal estate tax law was not subject to tax upon the death of Dr. Jacobs, the court below pointed out that to hold the same taxable involved giving an invalid retroactive effect to the Revenue Act of 1924 which would be opposed to the reasoning of this court in the cases of *Helvering v. Helmholz*, 296 U. S. 93; *Nichols v. Coolidge*, 274 U. S. 531, and *Hassett v. Welch*, 303 U. S. 303. Compare *Industrial Trust Co. v. United States*, 296 U. S. 220.

2. The decision below does not conflict with *Tyler v. United States*, 281 U. S. 497; *Third National Bank & Trust Company v. White*, 287 U. S. 577; *Helvering v. Bowers*, 303 U. S. 618, and *Foster v. Commissioner*, 303 U. S. 618, as alleged by petitioner.

All of these cases, except the *Foster* case, were *tenancy by the entirety* cases. The court below pointed out the essential differences between joint tenancies and tenancies by the entirety.

These essential differences have been recognized in decisions of this court which permit the inclusion in a decedent's gross estate of the full value of tenancies by the entirety created before 1916, but require the exclusion of the survivor's half of joint tenancies created before 1916.

This is evident from the *Tyler* case which arose under the Revenue Acts of 1916 and 1921 in which this court viewed the entire property held in tenancies by the entirety as passing at death because of the dominion over the survivor's interest which the decedent had retained due to the essential characteristics of such tenancies among which were that "neither can dispose of any part of the estate without the consent of the other." (P. 501.)

This is also evident from the *Third National Bank* and *Bowers* cases. Both of these cases arose after the retroactive provision of Section 302(h) of the Revenue Act of 1924 and involved tenancies by the entirety created before 1916; yet neither referred to this retroactive provision but simply cited the *Tyler* case. It is therefore clear that this Court would have reached the same result in the *Third National Bank* and *Bowers* cases had those cases arisen under revenue acts enacted prior to 1924. (*Goodenough v. Commissioner*, 83 F. (2d) 389.)

The contrary is true of joint tenancies. This is evident from the cases of *Knox v. McElligott*, 258 U. S. 546, and *Cahn v. United States*, 297 U. S. 691, in which this Court held that the survivor's interest in a joint tenancy could not be included in the gross estate of the first to die, the decedent having contributed the full purchase price. The decision in the *Knox* case was premised upon this Court's reluctance to hold the estate tax law invalid. This might have been required by construing the Congressional intent as including in the gross estate of Jonas Kissam the full value of the survivor's interest in the joint tenancy when "at the time the statute was passed Cornelia Kissam's interest belonged to her," and "in respect of which Jonas Kissam had in his lifetime no longer either title or control." (P. 548.)

There is nothing to reflect on the principle of the *Knox* case or of the *Jacobs* case in any of the joint tenancy cases cited by petitioner. The *Foster* case involved a joint tenancy created in 1930 and therefore had no retroactive element. The case of *Gwinn v. Commissioner*, 287 U. S. 224, involved only the decedent's half interest in the joint tenancy property and, as the petitioner states, was grounded on the *Tyler* case. There is no question that the half interest of the decedent passed at death and the language of the *Tyler* case is therefore appropriate. See *Griswold v. Helvering*, 290 U. S. 56.

3. The decision of the court below simply confirms the distinction between joint tenancies and tenancies by the entirety recognized in decisions of this court. The principle, moreover, is one of diminishing importance because of the fact that as to joint tenancies created after 1916 the law has been settled in favor of taxability.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be denied.

HUGH W. McCULLOCH,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 391

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL
AND TESTAMENT OF W. FRANCIS JACOBS, DECEASED,
Respondent.

BRIEF FOR RESPONDENT.

✓ HUGH W. McCULLOCH,
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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 70-75) is unreported. The opinion of the Circuit Court of Appeals (R. 88-92), is reported in 97 F. (2d) 784.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 28, 1938 (R. 92). The petition for certiorari was filed September 28, 1938, and certiorari was granted on November 7, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether, under Section 302 of the Revenue Act of 1924, the survivor's half interest in joint tenancy real estate acquired prior to the enactment of the Revenue Act of 1916, may be included in the gross estate of the decedent, the other joint tenant, who furnished the purchase price therefor.

STATEMENT.

The statement of the case set forth in the Petitioner's Brief is correct but too voluminous.

By deed dated July 29, 1909 and filed for record August 6, 1909, Lena De St. George conveyed and warranted to "W. Francis Jacobs and Elizabeth C. Jacobs, husband and wife, as joint tenants and not as tenants in common" the real estate in Illinois here in question (R. 64, 65). On June 17, 1924, W. Francis Jacobs, hereinafter referred to as Dr. Jacobs, predeceased his wife, Elizabeth C. Jacobs (R. 71). Under the provisions of Section 302 of the Revenue Act of 1924, the Commissioner included in the gross estate of Dr. Jacobs, subject to Federal estate tax, the one-half interest in this property which Dr. Jacobs acquired in 1909 and which passed upon his death to Mrs. Jacobs by reason of survivorship, and the Respondent makes no objection thereto. Under the provisions of Section 302 of the Revenue Act of 1924, the Commissioner included in the gross estate of Dr. Jacobs, subject to Federal estate tax, the one-half interest in this property which Mrs. Jacobs

acquired in 1909, (R. 51) and the District Court (R. 75) and the Circuit Court of Appeals (R. 87) have held that the inclusion in Dr. Jacobs' estate for Federal estate tax purposes of Mrs. Jacobs' one-half interest in this property was improper, and the Respondent in this proceeding urges that the decisions of the Courts below be sustained.

The tax here in controversy is \$142.50, i. e., 2% of \$9500. ($\frac{1}{4}$ of the value (R. 51) of the Humboldt Boulevard property here in question) diminished by 25% thereof (credit for inheritance tax paid).

In the first line of the first full paragraph on page 4 of Petitioner's Brief, the word "Petitioner" should read "Respondent."

Summary of Argument.

The courts below correctly held that Mrs. Jacobs acquired title and control of one-half of the joint tenancy real estate here in question in 1909 and that in her half, Dr. Jacobs had no title or control.

The courts below correctly held that the nature and character of the title to the real estate acquired by Dr. Jacobs and Mrs. Jacobs respectively by reason of the conveyance to them in joint tenancy in 1909 is not similar to the nature and character of the title to real estate acquired by tenants by the entirety.

The petitioner erroneously asserts "that there is no distinction so far as taxability is concerned between estates held by the entirety and those held in joint tenancy."

The courts below correctly held that the one-half interest in the jointly owned real estate, the title to which Mrs. Jacobs acquired in 1909, prior to the enactment of any Federal estate tax law, was not subject to tax upon the death of Dr. Jacobs in 1924, because such tax could only be imposed by giving an invalid retroactive construction to the Revenue Act of 1924.

ARGUMENT.

I.

The District Court and the Circuit Court of Appeals, in This Case, Correctly Held That Mrs. Jacobs Acquired Title and Control of One-Half of the Joint Tenancy Real Estate Here in Question in 1909 and That in Her Half Dr. Jacobs Had no Title or Control.

The Respondent agrees with the Petitioner that the deed of the premises here in question from Lena De St. George to Dr. and Mrs. Jacobs conformed to the provisions of the Revised Statutes of Illinois with reference to the creation of joint tenancies in real estate with the right of survivorship and that by this deed a joint tenancy with right of survivorship was created in the real estate here in question in 1909.

The material part of the Revised Statutes of Illinois providing for the creation of joint tenancies in real estate with right of survivorship which is referred to at page 16 of Petitioner's Brief and is set forth at page 22 of Petitioner's Brief, has been in effect in Illinois since 1827.

Mette v. Feltgen, 148 Ill. 357.

The Petitioner erroneously disregards the fact found by the court below (R. 90, 91) that under the Illinois law, Mrs. Jacobs acquired title to the one-half of the joint tenancy real estate the taxability of which is here in question, upon the delivery of the deed thereto in 1909.

A. Under the Laws of Illinois, Mrs. Jacobs Acquired Full Title, Control and Enjoyment of the One-half of the Joint Tenancy Real Estate Here in Question Upon the Creation of the Joint Tenancy in 1909, and Such Would Have Been the Result Under the Common Law.

In Illinois, as at common law, one joint tenant has the right to convey his half interest in the property during the lifetime of the other joint tenant without the concurrence of the other joint tenant.

Lawler v. Byrne, 252 Ill. 194, 196.

Szymczak v. Szymczak, 306 Ill. 541.

Washburn, Real Property, 5th Edition, page 675.

In Illinois, as at common law, one joint tenant, during the lifetime of the other joint tenant, may mortgage his half interest in joint tenancy real estate, or subject it to a lien.

Hardin v. Wolf, 318 Ill. 48.

Leise v. Hentze, 326 Ill. 633.

Kent's Commentaries, 7th Edition, Volume IV, page 379.

In Illinois, as at common law, one joint tenant may sue for partition during the lifetime of the other joint tenant without the concurrence of the other joint tenant.

Ill. Rev. Stat. 1937, Chap. 106, Sec. 1.

Barr v. Barr, 273 Ill. 621.

Kent's Commentaries, 7th Edition, Volume IV, page 379.

Washburn, Real Property, 5th Edition, page 682.

In Illinois, as at common law, each joint tenant is entitled to one-half of the rents and profits from the joint tenancy property.

Barr v. Barr, 273 Ill. 621.

Washburn, Real Property, 5th Edition, page 675.

In Illinois, as at common law, the half interest of each joint tenant is chargeable with his individual debts and is subject to levy and sale upon an execution against him.

Spikings v. Ellis, 290 Ill. App. 585.

Kent's Commentaries, 7th Edition, Volume IV, page 376.

B. This Court Has Held That One Joint Tenant Has No Title or Control in the Half Interest of his Co-Tenant.

This court, in the case of *Knox v. McElligott*, 258 U. S. 546, clearly recognized the principle that each of two joint tenants acquires full title, control and enjoyment of one-half of the joint tenancy property upon the creation of the joint tenancy, in quoting the following from the opinion of the District Court (at page 548):

"At the time the statute was passed, Cornelia Kism's interest belonged to her. * * * From the structure of the Act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control."

In his brief the Petitioner sees fit to disregard the finding of the court below (R. 91), that in 1909 Mrs. Jacobs acquired title to the one-half of the joint tenancy real estate here in question and that her interest was a vested property right. This finding of the court was correct, it is fully supported by the authorities cited above, and should be sustained.

II.

The District Court and the Circuit Court of Appeals, in This Case, Correctly Held That the Nature and Character of the Title to the Real Estate Acquired by Dr. Jacobs and Mrs. Jacobs Respectively by Reason of This Conveyance to Them in Joint Tenancy Is Not Similar to the Nature and Character of the Title to Real Estate Acquired by Tenants by the Entirety.

The court below found (R. 90):

"Illinois does not know estates by the entirety. In such estates the title of each grantee is to the whole and no act of the one can destroy or affect the right of survivorship in the other. When the one dies, he merely ceases to divide the enjoyment of the estate of which he was completely seized by virtue of the creative instrument. On the other hand the title of each joint tenant is to a share of the estate only. If one dies, the survivor becomes seized of the whole. But the creative instrument gives him title to only his share and the share which he receives as a result of the death of his co-tenant is a new one. Co-tenants possess the incidents of enjoyment such as sale, mortgage, lease, and partition."

This finding is amply supported by the authorities.

The incidents of joint tenancies and tenancies by the entirety in real estate have been known since feudal days and the differences between them have been commented on by legal writers and by the courts innumerable times.

In a joint tenancy with two joint tenants, each one, at the inception of the joint tenancy, acquires an undivided one-half interest in the property. From this follows the various attributes of joint tenancies enumerated above, none of which are applicable to tenancies by the entirety.

In tenancies by the entirety, which can only be created between husband and wife, in the eyes of the law there

is but a single ownership, the husband and wife being considered as a single entity, neither one of the tenants by the entirety owns a share of the property or can sever the tenancy during the lifetime of both and on the death of the husband, the wife for the first time becomes entitled to control the property or any part of it as her own.

In Kent's Commentaries, 7th edition, Volume IV, page 375, the author states with reference to joint tenants:

"They have each (if there be two of them for instance) an undivided moiety of the whole. * * * For the purposes of alienation, and to forfeit, and to lose by default in a *praecipe* he, (a joint tenant) is seized only of his undivided part or proportion."

In Holdsworth, A History of English Law, (1909 ed.) Vol. III, page 108, the author states:

"Tenancy by entireties can only exist where an estate is given to husband and wife. During their marriage husband and wife are one person in law; and an estate so given must come to the wife (unless it has been conveyed away by fine), notwithstanding any alienation or forfeiture incurred by the husband."

In Preston, Elementary Treatise on Estates, in speaking of tenancies by the entirety, the author states at page 131:

"The husband and wife have not either a joint estate, a sole or several estate, nor even an estate in common. From the unity of their persons by marriage they have the estate entirely as one individual, and on the death of one of them, the entire tenement will, for all the estate of which they are seised in this manner, belong to the survivor, without the power of alienation or forfeiture of either alone, to prejudice the right of the other."

In Tiffany on Real Property, 2d Edition, Vol. I, page 645, the author states:

"The most important incident of tenancy by entireties is that the survivor of the marriage, whether the husband or the wife, is entitled to the whole, which

right cannot be defeated by a conveyance by the other to a stranger, as in the case of a joint tenancy, nor by a sale under execution against such other."

And at page 655:

"There can be no partition of land held by the entirety, since this would imply a separate interest in each tenant, contrary to the underlying theory of the tenancy."

In Washburn, Law of Real Property, 5th Edition, the author states at page 343:

"In consequence of the theoretic unity and entirety of the ownership of husband and wife in respect to their interest in lands, they cannot take by purchase in moieties; * * * They are not properly joint tenants of such lands, since, though there is a right of survivorship, neither can convey so as to defeat this right in the other. Each takes an entirety of the estate."

In discussing joint tenancies, the author states at page 675:

"But for purposes of alienation, each has only his own share. And the shares of several joint-tenants, as well as of tenants in common, are always presumed to be equal."

In Kent's Commentaries, 7th Edition, Volume 4, the author, after a discussion of early statutes abolishing joint tenancies, states, at page 378:

"The destruction of joint tenancies, to the extent which has been stated, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint tenancies, but conveyances to one person. They cannot take by moieties, but they are both seised of the entirety, and the survivor takes the whole; and, during their joint lives, neither of them can alien so as to bind the other. If the husband be attainted, his attainder does not affect the right of the wife, if she survive him; nor is such an estate, so held by the husband and wife, affected by the statutes of partition."

Estates by the entirety have not been possible in Illinois at any time since the enactment of the "Married Woman's Law" in 1861.

Cooper v. Cooper, 76 Ill. 57.

Mittel v. Karl, 133 Ill. 65.

Lawler v. Byrne, 252 Ill. 194.

The Petitioner to the contrary notwithstanding, the finding of the Court below (R. 90) that the nature and character of the title to the real estate acquired by Dr. Jacobs and Mrs. Jacobs respectively by reason of the conveyance to them in joint tenancy of the real estate in question is not similar to the nature and character of the title of real estate acquired by tenants by the entirety, was correct and is fully supported by the authorities cited above and should be sustained.

III.

The Petitioner Erroneously Asserts "That There Is No Distinction So Far as Taxability Is Concerned Between Estates Held by the Entirety and Those Held in Joint Tenancy."

The statement quoted above, appearing on page 9 of Petitioner's brief, erroneously states the law. There is a great distinction so far as taxability is concerned between joint tenancies and tenancies by the entirety as this Court, other courts and the Commissioner have recognized.

This distinction is apparent from a comparison of the different treatment of the two tenancies, in cases arising under Revenue Acts in force prior to 1924 and from an examination of the basis of this Court's holdings with respect to the tenancy by the entirety cases.

This Court has decided that under the Revenue Acts in force prior to the Revenue Act of 1924, in the value of the

gross estate of a decedent for Federal estate tax purposes, there can be included only one-half of the value of real estate held as joint tenants by the decedent and another person, if the joint tenancy was created prior to 1916, even though the decedent furnished all of the purchase price therefor.

In the case of *Knox v. McElligott*, 258 U. S. 546, it appeared that Jonas B. Kissam and Cornelia B. Kissam, his wife, in 1912, acquired bonds and mortgages as joint tenants which had been theretofore owned by Mr. Kissam. Mr. Kissam died in 1917 and estate tax was assessed upon the entire value of the jointly owned property. Upon a suit to recover that portion of the tax which was based upon the half interest in the joint tenancy property which Mrs. Kissam acquired when the joint tenancy was created, the District Court found in favor of the taxpayer, the Circuit Court of Appeals for the Second Circuit reversed, but this Court reversed the Circuit Court and held that as the decedent had neither title nor control of his wife's one-half of the joint tenancy property, it was not proper to include her one-half interest in his estate for Federal estate tax purposes.

In the case of *Cahn v. United States*, 297 U. S. 691, it appeared that the Court of Claims had determined that the entire value of joint tenancy property acquired by the decedent and his wife in 1909 should be taxed in the estate of the decedent who died in 1921, his wife having survived him. This Court reversed the Court of Claims in a *per curiam* decision in which the *Knox* case was cited; the rule announced in the *Knox* case must therefore still prevail.

As noted above, in the *Knox* and *Cahn* cases, this Court announced the rule that under the Revenue Acts in force prior to the Revenue Act of 1924, there can be included in the value of the gross estate of the decedent for Federal

estate tax purposes, only one-half of the value of the joint tenancy real estate held by the decedent and another person if the joint tenancy was created prior to 1916 and even though the decedent furnished all of the purchase price therefor. The rule in the *Knox* and *Cahn* cases should be contrasted with the rule as to the taxability, under the Revenue Acts in force prior to the Revenue Act of 1924, of tenancies by the entirety created prior to 1916, announced in the case of *Goodenough v. Commissioner*, 83 F. (2d) 389 (C. C. A. 6th), in which the Court held that under the Revenue Act of 1921, tax was properly imposed upon the entire value of property held by the decedent and his wife as tenants by the entirety, the tenancy having been created prior to 1916 and the decedent having furnished all of the purchase price therefor.

The Respondent submits that the decisions of this Court in the tenancy by the entirety cases which have arisen under the Revenue Act of 1924 and the Revenue Acts prior and subsequent thereto have indicated a basis for taxation of the entire value of the property held by the decedent as a tenant by the entirety which is not applicable and does not justify the taxation under the Revenue Act of 1924 of more than one-half of the value of the joint tenancy real estate held by the decedent and another person if the joint tenancy was created prior to 1916 even though the decedent furnished all of the purchase price therefor.

In the case of *Helvering v. Bowers*, 303 U. S. 618, the court below held that tax was improperly imposed under the Revenue Act of 1926 upon the entire value of property held by the decedent and his wife as tenants by the entirety, the tenancy having been created prior to 1916, but this Court, in a *per curiam* opinion, citing only the case of *Tyler v. United States*, 281 U. S. 497, held that the entire value of this tenancy by the entirety property should be included

in the estate of the decedent who had furnished the purchase price therefor.

The Respondent submits that the basis for the decision in the *Tyler* case was expressed clearly by this Court and in language not applicable to joint tenancies beginning at page 503, as follows: (1) "the wife had the right to possess and use the whole property but so, also, had her husband;"—that is, neither spouse could avoid the other's right in the whole, which is not the case in a joint tenancy. (2) "she could not dispose of the property except with her husband's concurrence;"—each joint tenant may dispose of his half interest in the property during the lifetime of both without the concurrence of the other joint tenant. (3) "her rights were hedged about at all points by the equal rights of her husband"—a joint tenant's rights in his half of the joint tenancy property are not hedged about by any rights of the other joint tenant. (4) "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment;"—the Court here is stressing the *exclusive* right, that is, the right to deal with the property or any part of it without the assent of the other. By the insertion of the word "whole" in the following clause on page 10 of the Petitioner's Brief: "upon the death of the decedent and because of it, the survivor of the joint tenancy, for the first time, became entitled to the exclusive possession, use and enjoyment of the whole property, as her own", the Petitioner seeks by paraphrase to make this statement of the Court in the *Tyler* case refer to the combined interests of both joint tenants in the whole property, when in the *Tyler* case it was meant to refer to the exclusive, independent and sole right to deal with the tenancy by the entirety property which the surviving wife only acquired upon the death of her husband. Obviously the statement of the Court in the *Tyler*

case does not refer nor is it applicable to the joint tenancy here in question because Mrs. Jacobs had the exclusive, independent and sole right to deal with that one-half the joint tenancy property from the time of the creation of the joint tenancy in 1909. The Court's meaning in the *Tyler* case, however, is clear, and is further clarified by the remainder of the sentence, which follows: (5) "she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own;"—however in a joint tenancy, each co-tenant at any time during the lifetime of both, can deal with his half of the property as the sole owner thereof. (6) "and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will." The Petitioner at page 10 of his brief in the clause, "then only, did the survivor become assured of the power of disposing of the property by will," seems to paraphrase this language in the *Tyler* case and ingeniously suggests that the Court was stressing the right to *will*, that is, to bequeath or devise the property. Obviously the reference to "her sole *will*" in the *Tyler* case is to the free volition of the wife after the death of her husband when during his lifetime she could do nothing with the tenancy by the entirety property without his concurring therein. The petitioner's use of the word "whole" in modifying the meaning of the fourth quotation, and the contracting of "by the exercise of her sole will" into "by will" may be excusable as argument but reveals an improper attempt to reach the same conclusion logically as to joint tenants as this court has reached as to tenants by the entirety by changing the middle term of the syllogism.

In the *Tyler* case, tax was imposed under Revenue

Acts prior to the Revenue Act of 1924 upon tenancies by the entirety which were created after 1916. In view of the fact that in the *Bowers* case this Court did not refer to the retroactive provision contained in Section 302(h) of the Revenue Act of 1926, and since that section of the law was not in effect at the time of the *Tyler* case, the Respondent submits that the question of the time of the creation of a tenancy by the entirety or the presence or absence of a retroactive provision in the Revenue Act involved are not material in cases involving tenancies by the entirety. This was the government's position in the *Bowers* case. The government claimed (pp. 10 and 13 of petitioner's brief in the *Bowers* case) that there was no constitutional question of retroactivity because the entire interest ceased at death and for this reason "it is clearly immaterial when the tenancy was created."

It should be particularly noted that the *Goodenough*, *Knox* and *Cahn* cases all arose under Revenue Acts prior to 1924, the *Goodenough* case involving a tenancy by the entirety created prior to 1916, the *Knox* and *Cahn* cases involving joint tenancies created prior to 1916, and the Respondent suggests that the only valid distinction which justifies the different decisions in those cases is the fundamental difference between a tenancy by the entirety involved in the *Goodenough* case, and joint tenancies involved in the *Knox* and *Cahn* cases. It is suggested that the *Goodenough*, *Tyler* and *Bowers* cases, involving tenancies by the entirety created before and after 1916 and taxable under Revenue Acts before and after 1924, were correctly decided because property held in tenancy by the entirety truly passes in its entirety to the wife upon the death of her husband, for until the death of the husband, he retains complete control, and all the other attributes of ownership in the tenancy by the entirety property.

That the rule announced in the *Tyler* case is not applicable to this case is shown further by noting that in the *Tyler* case this Court found that the husband who furnished the consideration for the property held as tenants by the entirety retained control of the property up to the moment of his death. This was similar to the right of revocation reserved by the grantor in the trust property held taxable in the cases of *Reinecke v. Northern Trust Company*, 278 U. S. 339; and *Saltonstall v. Saltonstall*, 276 U. S. 260, and similar to the right to change beneficiaries reserved by the insured in the policies of insurance held taxable in *Chase National Bank v. United States*, 278 U. S. 327. The Court in the *Tyler* case noted the relevancy of these cases for this reason. It is obvious that Dr. Jacobs had no interest or control over the share of the joint tenancy property acquired by his wife in 1909, which is comparable to the power of revocation and to change beneficiaries which was the basis of taxation in the *Reinecke*, *Saltonstall* and *Chase National Bank* cases.

That there should be a distinction as to the taxability of estates by the entirety and joint estates is further recognized in the Regulations relating to Federal Gift Tax (Articles 2(7), 2(8), 19(8) Regulations 79). These Regulations treat the interest that a joint tenant receives who furnishes no consideration, as a gift of one-half of the value of the property, but in dealing with tenancies by the entirety these Regulations direct that the value of the interest received by a tenant by the entirety be computed as the value of the life interest plus the value of the right of survivorship based on mortality tables. Thus the Commissioner himself recognizes "the distinction so far as taxability is concerned" between the two estates and recognizes that each joint tenant truly owns one-half of the joint tenancy property and

that the interest which the tenant by entirety owns depends upon his chances of survival and is directly related to the death of the other tenant.

The Respondent therefore submits that this Court, other courts, and the Commissioner have heretofore recognized that a distinction exists so far as taxability is concerned, between estates held by the entirety and those held in joint tenancy and the Court below correctly determined that that distinction should be given effect in this case and properly determined that the rule announced by this Court in the *Tyler* case is not applicable in this case.

From the foregoing it must appear that the distinction, so far as taxability is concerned, between estates by the entirety and joint tenancies has been clearly recognized heretofore and the Respondent urges that in this case this distinction should be given effect.

IV.

The District Court and the Circuit Court of Appeals, in This Case, Correctly Held That the One-Half Interest in the Jointly Owned Real Estate, the Title to Which Mrs. Jacobs Acquired in 1909, Prior to the Enactment of Any Federal Estate Tax Law, Was Not Subject to Tax Upon the Death of Dr. Jacobs in 1924 Because Such Tax Could Only Be Imposed by Giving an Invalid Retroactive Construction to the Revenue Act of 1924.

The Respondent submits that Sections 302 (e) and (h) of the Revenue Act of 1924 should not be construed as imposing tax in the estate of a deceased joint tenant, on the value of the surviving joint tenant's interest in joint tenancy real estate acquired prior to 1916, for if so construed those Sections are in violation of the Fifth Amendment to the Constitution.

In his Tax Message to Congress of January 19, 1939, President Roosevelt, referring to the effect of the decision of this Court in *Helvering v. Gerhardt*, 304 U. S. 405, which makes the compensation received by employees of the Port of New York Authority taxable for the last three years, set forth many of the reasons which make the retroactive application of tax laws unjust, oppressive and contrary to the principles of the Constitution. He stated:

"In the interest of equity and justice, therefore, immediate legislation is required to prevent recent judicial decisions from operating in such a retroactive fashion as to impose tax liability on these innocent employees and investors for salaries heretofore earned or on income derived from securities heretofore issued. * * * Accordingly, I recommend legislation to correct the existing inequitable situation and at the same time to make private income from all government salaries hereafter earned and from all government securities hereafter issued subject to the general income tax laws of the nation and of the several States." New York Times, January 20, 1939, page 2.

The comments of President Roosevelt are amply supported by the authorities with reference to retroactive legislation.

In *Story's Commentaries on the Constitution of the United States*, the author states, in Volume 2, 5th edition, at page 272:

"Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact."

The *Constitution of the State of New Hampshire*, Part First, Article 23d (Public Laws of New Hampshire, 1926, p. 8), declares:

"Retrospective laws are highly injurious, oppressive, and unjust."

In *Kent's Commentaries on American Law*, Volume 1, Twelfth edition, edited by O. W. Holmes, Jr., the author states at page *455:

"A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of *Dash v. Van Kleeck* (7 Johns. 477) and shown to be founded not only in English law, but on the principles of general jurisprudence."

See also *United States v. Heth*, 3 Cranch 399, 408, 413, 414; *Potter's Dwarrris, Treatise on Statutes*, page 164; *The Federalist*, No. XLIV (Madison).

This Court has fully recognized the principles set forth above, and as to transfers fully consummated and interests in property completely vested prior to 1916, the retroactive provisions of the Revenue Act of 1924, as well as prior and subsequent Acts, have been held to be unconstitutional or have been restricted or construed as not applicable in order to prevent an invalid retroactive operation thereof. Revenue Acts which have contained retroactive provisions have been by this Court limited in their scope to transfers completed after the enactment of some Federal estate tax law comprehending such taxation.

In *Lewellyn v. Frick*, 268 U. S. 238, a case which cited and followed the *Knox* case, Mr. Justice Holmes, in speaking of the doubt as to the constitutionality of the Revenue Act of 1919 if construed as applicable to the proceeds of paid-up policies of insurance upon the life of a decedent issued in 1901 which were payable to the wife of the decedent and in which the decedent had retained no power to change the beneficiary, said at page 251:

"Not only are such doubts avoided by construing the

statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

In *Nichols v. Coolidge*, 274 U. S. 531, this Court considered the Revenue Act of 1918 which was the first estate tax law to contain an express provision for retroactivity in that it directed that there should be included in the gross estate of a decedent, the value of property which the decedent had at any time transferred in trust to take effect in possession or enjoyment at or after his death "whether such transfer or trust is made or created before or after the passage of this Act." The trust which the Commissioner asserted to be taxable was created in 1907. By this trust the decedent reserved to herself the right to the income for life, but this right to the income was assigned by the decedent to the remaindermen in 1917. The decedent died in 1921. This Court held that the Act, to the extent that it required the inclusion of this trust property in the estate of the decedent, was in violation of the Fifth Amendment because it was arbitrary, capricious, and amounted to confiscation in view of the fact that the transfer in 1907 was irrevocable and not testamentary in character. Surely the transfer in 1909 to Mrs. Jacobs of her half interest in the joint tenancy property here in question was similarly irrevocable and not testamentary in character.

In *Hassett v. Welch*, 303 U. S. 303, this Court held that the provisions of the joint resolution of Congress of May 3, 1931 and the Revenue Act of 1932 should be construed as "prospective in their operation" and not as imposing "a tax in respect of past irrevocable transfers with reservation of a life interest."

The inclusion for the first time in the Revenue Act of 1924 of Section 302(h), the retroactivity clause, does not resolve the constitutional doubts as to the propriety of taxing the survivor's half-interest in joint tenancy property acquired before 1916, which were noted in the *Knox* and in many other cases.

In *Bingham v. United States*, 296 U. S. 211, this Court held that to avoid grave doubts as to its constitutionality, the Revenue Act of 1918 should not be construed retroactively as applying to the proceeds of policies of insurance which the decedent had assigned to his wife in 1904, the decedent having retained no power to control the policies in any way after the assignment to his wife. The similarity of this *Bingham* case to the *Knox* case should be noted in that they both arose under the Revenue Act of 1918 which contained no retroactive clause, and there was involved in each case, rights and interests in property which the survivor had acquired long prior to the enactment of any Federal estate tax law.

In *Industrial Trust Company v. United States*, 296 U. S. 220, this Court held that Section 302(h) of the Revenue Act of 1926, which is identical with Section 302(h) of the Revenue Act of 1924, was not applicable to the proceeds of paid-up life insurance policies on the life of the decedent who died in 1930, the policies having become paid up in 1912. In discussing the provisions of Subdivision (h) the Court said at page 221, "Whether any of these terms apply to an amount receivable by a beneficiary, under a policy such as we have here, is fairly debatable. . . . If any of them do apply, the provision is open to grave doubt as to its constitutionality, and the rule of the *Frick* case controls." It is submitted that in this case Section 302(h) should be similarly construed to avoid a like result as to joint tenancies.

As the *Bingham* case held that the right of the survivor to the proceeds of an insurance policy which had been vested in the survivor prior to 1916, was not taxable under the Revenue Act of 1918 and was thus similar to the *Knox* case, so this *Industrial Trust Company* case which holds that the right of the survivor to the proceeds of an insurance policy which had been vested in the survivor prior to 1916, was not taxable under the Revenue Act of 1926 which contained a retroactive clause, is similar to this *Jacobs* case.

Taxation of an interest should not be countenanced when it was created before there was any knowledge available, of the susceptibility of such interest to taxation and without any control over the ultimate disposition of that interest remaining in the decedent to cease at his death. The Respondent therefore suggests that the following words of Section 302(h), i. e., "before or after the enactment of this Act," should properly be limited to mean,—before or after the enactment of this Act but after September 8, 1916 as to the survivor's half in joint tenancy property. This would be merely imputing to Congress the intention of including the full value of interests held in joint tenancies so far as constitutionally possible.

If not so limited Section 302(h) must be held to be so unreasonable, arbitrary, capricious and oppressive as to be a denial of due process because it defeats the reasonable expectations of a person, who in 1909 in entire good faith and without the slightest premonition of such a consequence, made absolute disposition of property in joint tenancy which he might have refrained from making had he anticipated the enactment of this law. *Nichols v. Coolidge*, 274 U. S. 531; *Coolidge v. Long*, 282 U. S. 582; *Helvering v. Helmholz*, 296 U. S. 93; *White v. Poor*, 296 U. S. 98.

In the case of *Milliken v. United States*, 283 U. S. 15, this Court held at page 24 that a retroactive tax law was not

unconstitutional if the decedent had been "well warned that it might be taxed." In the case of *Welch v. Henry* (decided November 21, 1938) this Court recognized that retroactive applications of Federal estate and gift tax laws were unconstitutional because "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event." In the case of *Graham and Foster v. Goodcell*, 282 U. S. 409, this Court held at page 429, that a retroactive tax law was not unconstitutional in "the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."

It should be noted that joint tenancies did not become subject to an "established policy of taxation" until 1916 and that until July 3, 1930, the Regulations did not specifically provide that any portion of joint tenancy property created prior to 1916 was subject to tax under the Revenue Act of 1924 or the Revenue Acts prior and subsequent thereto. It is therefore apparent that at no time prior to his death did Dr. Jacobs have any knowledge or means of determining that his estate would be burdened with this tax and he might well have refrained from creating this joint tenancy had he known that the half-interest therein acquired by Mrs. Jacobs in 1909 would have been subject to tax at the time of his death. It is also apparent that Section 302(h) of the Revenue Act of 1924 should not be given retroactive effect to impose tax in this case in order to prevent tax avoidance, for Dr. Jacobs when he caused the conveyance to be made in joint tenancy in 1909 can have had no motive of avoiding a tax which was for the first time imposed under the Revenue Act of 1916.

The Respondent suggests that if Section 302(e) of the

Revenue Act of 1924 is applied retroactively, as the Petitioner seeks to apply it in this case, it further violates the Fifth Amendment because it results in an arbitrary, unreasonable and capricious classification for tax purposes of property held by a decedent in joint tenancy. It should be noted that Section 302(e) provides that as to property held by a decedent as a joint tenant the entire value of the joint tenancy should be included in the decedent's estate subject to tax except (1) in cases where the survivor can show that he was the original owner of all or a part of such property and that it never was received or acquired by the survivor from the decedent for less than a fair consideration, in which event there shall be included in the estate of the decedent only such part of the value of the property as is proportionate to the consideration furnished by the decedent; and (2) in cases where the joint tenancy property has been acquired by gift, bequest, devise or inheritance, and then only to the extent of one-half the value thereof. It must be assumed that the estate tax law is proper only as a tax upon the transfer of property at death and if it be determined that the decedent has any interest whatsoever in the half-interest of the surviving joint tenant, the imposition of tax on the entire value of the joint tenancy only if the decedent furnished the entire consideration therefor, is arbitrary, unreasonable and capricious unless such a classification is justifiable to prevent tax avoidance or evasion with reference to joint tenancies created after 1916; but obviously such a classification is not justified as to joint tenancies created prior to 1916 when tax evasion or avoidance could not have been the motive for creating the joint tenancy.

The Respondent suggests that to require the inclusion in the measure of the taxable estate of a deceased joint tenant dying after 1924 of the value of the survivor's half interest acquired prior to 1916, as a gift from the decedent, which

the Petitioner urges should be done in this case, but not when the joint tenancy property is acquired otherwise, violates the general rule that the measure of a tax cannot specially include property or transactions beyond the power of the taxing authority to tax directly. As this Court said in *Frick v. Pennsylvania*, 268 U. S. 473, at page 494:

“Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State’s power included what was excluded by the Constitution. This ground in our opinion is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly and would render important constitutional limitations of no avail.”

The contention of the petitioner that the questions presented in this case have been disposed of in the Government’s favor by the *per curiam* decision in the case of *Foster v. Commissioner*, 303 U. S. 618, cannot be sustained, as the joint tenancy which was there held to be taxable was created in 1930. Obviously the question of whether the law should be given retroactive effect was not involved in the *Foster* case for Section 302(h) or its counterpart had been in each Revenue Act since 1924 and the provisions imposing tax on joint tenancy property had been included in all Revenue Acts since 1916.

That the question of giving retroactive effect to the statute was not involved in the *Foster* case is apparent from the “Memorandum for the Respondent” filed by the Government in the *Foster* case. In that it appears that the Government did not oppose *certiorari* if limited to the question of “whether the full value of property which originally belonged to the decedent or for which he furnished the entire consideration and which subsequent to the enactment of the first estate tax act, was conveyed to the decedent and

his wife as joint tenants may be included in the gross estate of the decedent as a measure for Federal estate tax." (Italics supplied.)

If by the citation of the case of *Gwinn v. Commissioner*, 287 U. S. 224 at Page 9 of his Brief, the Petitioner is contending that this Court has held that Section 302(h) should be given retroactive effect, this contention cannot be supported. In the *Gwinn* case, this Court had before it only the question as to the taxability of the decedent's half of the joint tenancy property and the Court cited Section 302(h) simply to rebut the assertion that the Act should be construed as not applying to the decedent's half-interest therein as the taxpayer had claimed that the survivor acquired his right to the decedent's half-interest in the property prior to 1916 because the joint tenancy was created prior to that date. Petitioner submits that the true basis of the decision in the *Gwinn* case was that the interest of the decedent in the one-half of the joint tenancy property in question passed at his death to the survivor. That this was the true basis of the *Gwinn* case is evident from the quotations from and reliance upon the *Tyler* case in which it was pointed out the interest of decedent which, in that case, pervaded the whole property passed at death. That this was the true basis of the *Gwinn* case is also evident from *Griswold v. Helvering*, 290 U. S. 56, a later case involving the Revenue Act of 1921 which did not contain the retroactive provision of the Act of 1924 in which it was held that the decedent's half-interest in joint tenancy property acquired in 1909 was likewise subject to Federal estate tax. The Respondent therefore submits that the obstacle of a retroactive application of the law referred to in the *Knox* case was not present in the *Gwinn* case as only the decedent's half-interest in the joint tenancy property was involved and that passed at his death.

The cases of *Commissioner v. Emery*, 62 F. (2d) 591, and *O'Shaughnessy v. Commissioner*, 60 F. (2d) 235, cited in Note 4 on Page 9 of the Petitioner's Brief, do not sustain his contention, as the joint tenancy properties involved in these cases were both acquired after the enactment of the first Federal estate tax law in 1916, the joint tenancy property in the *Emery* case having been acquired in 1920, the joint tenancy property in the *O'Shaughnessy* case having been acquired in 1919. The only authority which supports the Petitioner's contention is *Dimock v. Corwin*, which is now before this Court.

The Petitioner bases his argument that the *Foster* case is controlling herein on the erroneous assertion at Page 12 of his Brief that "in the case of a joint tenancy it also is true that the interest of the decedent pervades the whole property and ceases only at his death, which perfects the interest of the survivor in the whole estate." This is obviously wrong. In 1909 Dr. Jacobs and Mrs. Jacobs, each, acquired title to one-half of the property here in question. The only right which Dr. Jacobs had in the one-half of this property which Mrs. Jacobs acquired in 1909 and which the Petitioner asserts is subject to tax, was the right to acquire the same by survivorship if he survived Mrs. Jacobs and if the joint tenancy was not severed during the lifetime of both joint tenants by the act of either party. His right in Mrs. Jacobs' half of the property is therefore similar to a remainder contingent upon survivorship, a reverter contingent upon survivorship, and an inchoate right which never comes into existence by reason of the conditions never having been met. This Court has frequently held that the mere possibility of acquiring property by survivorship which ceased at death does not justify the inclusion of that property in the estate of the original owner for the purposes of taxation. *Helvering v. Helmholz*,

296 U. S. 93; *White v. Poor*, 296 U. S. 98; *Helvering v. St. Louis Union Trust Co.*, 296 U. S. 39; *Becker v. St. Louis Trust Company*, 296 U. S. 48.

The Respondent urges that Sections 302(e) and (h) should be construed in this case as not imposing tax upon the one-half interest in the jointly owned real estate which Mrs. Jacobs acquired in 1909 or that if so construed these Sections are invalid because they violate the Fifth Amendment.

Conclusion.

Resistance to unreasonable, arbitrary, capricious and oppressive taxation has been a powerful factor in English and American history. It precipitated the revolution in England which ultimately established the sovereignty of Parliament and it was the vital issue which led to the eventual independence of the United States. While, in no other field is the authority of Congress less restricted by constitutional limitations than in the field of taxation, nevertheless there are limitations that have been and that should properly be continued to be placed upon Congress in its imposition of taxes and these limitations in the past have been made effective by a construction of the taxing laws in such a manner as to make them not subject to constitutional attack or by holding them in violation of the Constitution.

President Roosevelt, in his Annual Message to Congress of January 4, 1939, voiced an almost universal sentiment when he stated:

"It will cost us taxes and the voluntary risk of capital to attain some of the practical advantages which other forms of government have acquired.

Dictatorship, however, involves costs which the American people will never pay: the cost of our spiritual values. The cost of the blessed right of being

able to say what we please. The cost of freedom of religion. The cost of seeing our capital confiscated. The cost of being cast into a concentration camp. The cost of being afraid to walk down the street with the wrong neighbor. The cost of having our children brought up not as free and dignified human beings, but as pawns molded and enslaved by a machine.

If the avoidance of these costs means taxes on my income; if avoiding these costs means taxes on my estate at death, I would bear those taxes willingly as the price of my breathing and my children breathing the free air of a free country, as the price of a living and not a dead world."

However, the Government of the United States should be able to provide all its necessary revenues without attempting to reach and tax events so far in the past, with a purported transfer tax on a transfer theretofore completely enjoyed and consummated. While the question of the justice of taxes is ordinarily for Congress to determine and not for the Courts to pass upon, the construction of the Revenue Act of 1924 as imposing tax upon the half interest in the joint tenancy property which Mrs. Jacobs acquired in 1909 for which the Petitioner contends, is an instance of injustice for which there are constitutional grounds for judicial interference.

Wherefore, the Respondent submits that the decisions of the Courts below should be affirmed.

HUGH W. McCULLOCH,
Counsel for Respondent.

FRANK H. McCULLOCH,
LEWIS C. MURTAUGH,
NED P. VEATCH,
Of Counsel.



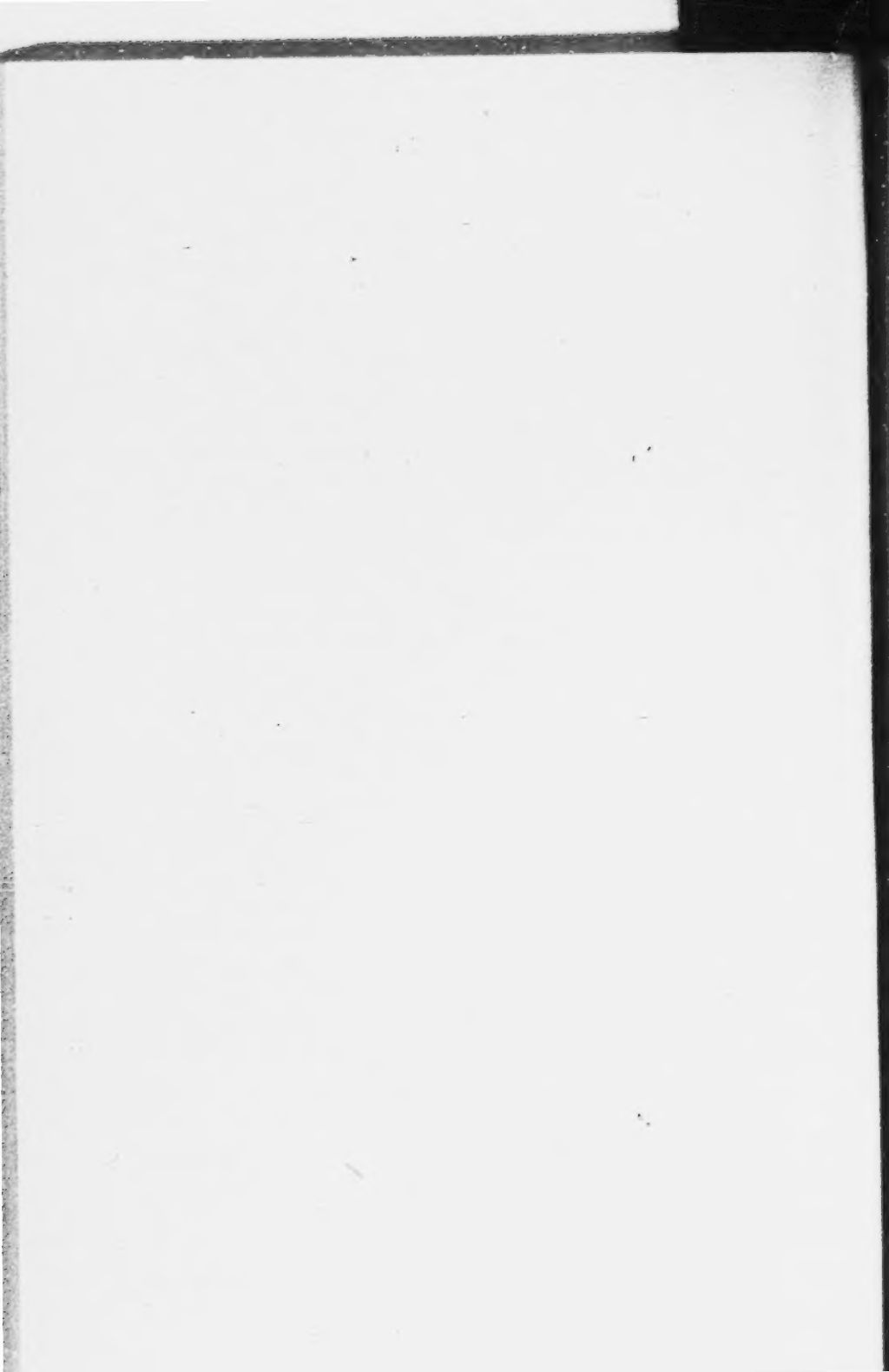
APPENDIX.

Revenue Act of 1924, c. 234, 43 Stat. 253:

"SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."



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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1938.

No. 391

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

ELIZABETH C. JACOBS, EXECUTRIX OF THE LAST WILL
AND TESTAMENT OF W. FRANCIS JACOBS, DECEASED,
Respondent.

MOTION.

HUGH W. McCULLOCH,
Counsel for Respondent.

NED P. VEATCH,
Of Counsel.



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Respondent.

MOTION.

Now comes Elizabeth C. Jacobs, the Executrix of the Last Will and Testament of W. Francis Jacobs, deceased, the Respondent in the above entitled cause, by Hugh W. McCulloch, her counsel, and moves this Honorable Court to set aside the judgment entered herein on February 27, 1939, and to enter judgment herein affirming the judgment of the Circuit Court of Appeals for the Seventh Circuit.

In support of said motion, the Respondent respectfully shows the following:

1. That on March 1, 1937, during the First Session of the 75th Congress, there was enacted what now appears as Section 375a of Title 28 of the United States Code. Said Section 375a was an addition to said Title 28 not theretofore appearing therein and provided as follows:

“An Act to provide for retirement of Justices of the Supreme Court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code (U. S. C., title 28, sec. 375) and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired justice may be willing to undertake."

(Act of March 1, 1937, c. 21, Secs. 1, 2; 50 Stat. 24; 28 U. S. C., Supp. IV, 1934 ed. Sec. 375a.)

That Section 260 of the Judicial Code (U. S. C., title 28, Sec. 375) which was referred to in said Section 375a provided in part as follows:

"When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to under-

take or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake."

Act of March 1, 1929, c. 419; 45 Stat. 1422; 28 U. S. C., 1934 ed., Sec. 375.)

2. That prior to March 1, 1937, Justices of the Supreme Court who did not desire to continue in regular active service on the bench could not retire but could only resign from that office and any such Justice, having so resigned, no longer held a commission as a judge of any court created under the provisions of Section 1 of Article III of the Constitution of the United States, and the amount of the compensation that such individual was entitled to receive as a former Justice of the Supreme Court but now resigned, was not subject to the provisions of said Section 1 of Article III of the Constitution and the amount of such compensation could be reduced by Congressional action, and in the case of Mr. Justice Holmes, who resigned on January 2, 1932, his compensation was reduced from \$20,000 per year to \$10,000 per year by Section 107 (a) (5) of the Economy Act" enacted June 30, 1932. (47 Stat. 402; 5 U. S. C., Supp. VI, p. 37.)

3. That under the provisions of said Sections 375 and 375a of Title 28 of the United States Code, on and after March 1, 1937 the emoluments of the office of Justice of the Supreme Court were increased, in that Justices, who had attained or should attain the age of seventy years and who had held a commission as Justice of the Supreme Court for at least ten years prior thereto, were authorized to retire from regular active service on the bench, upon the salary of \$20,000 per year, but after so retiring, their status continued to be that of judge as defined by Section 1 of Article III of the Constitution and the amount of compensation receivable by them could not, under the provisions

of Section 1 of Article III of the Constitution, be decreased by any action of Congress and said compensation was receivable by them without any obligation to perform any further service therefor, all of which were rights, privileges and emoluments which had not theretofore been granted to Justices of the Supreme Court.

Evans v. Gore, 253 U. S. 245.

Booth v. United States, 291 U. S. 339.

4. That under the provisions of Section 375a of Title 28 quoted above, there was created the office of Justice to succeed a Justice of the Supreme Court retiring from regular active service on the bench, an office which had not theretofore existed.

5. That the second paragraph of Section 6 of Article I of the Constitution provides in part as follows:

“No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; * * *”

The occasion for the inclusion of this provision in the Constitution is indicated in the debate in the Constitutional Convention with reference to this provision.

The following appears in Mr. Madison's notes of the session of the Convention held on September 3, 1787:

“Mr. Sherman was for entirely incapacitating members of the Legislature. He thought their eligibility to offices would give too much influence to the Executive. He said the incapacity ought at least to be extended to cases where salaries should be *increased*, as well as *created*, during the term of the member. He mentioned also the expedient by which the restriction could be evaded to wit: an existing officer might be translated to an office created, and a member of the Legislature be then put into the office vacated.”

(The Records of the Federal Convention, Farrand, 1911 Edition, Volume 2, page 490.)

The purposes of this provision of the Constitution were further indicated by Luther Martin, one of the delegates to the Constitutional Convention, in his address to the Legislature of the State of Maryland on November 29, 1787. In that address he stated:

"In the *sixth* section of the *first* article, it is provided, that senators and representatives may be appointed to any civil office under the authority of the United States, except such as shall have been created, or the emoluments of which have been increased, during the time for which they were elected. * * * But, Sir, we sacredly endeavoured to preserve all that part of the resolution which prevented them from being *eligible to offices under the United States*; as we considered it *essentially necessary* to preserve the *integrity, independence, and dignity* of the legislature and to secure its members from *corruption*."

(The Records of the Federal Convention, Farrand, 1911 Edition, Volume III, page 200f.)

6. That on May 18, 1937 Mr. Justice Van Devanter forwarded to President Franklin D. Roosevelt the following letter:

"My dear Mr. President:

Having held my commission as an Associate Justice of the Supreme Court of the United States and served in that Court for 26 years, and having come to be 78 years of age, I desire to avail myself of the rights, privileges, and judicial service specified in the act of March 1, 1937, entitled 'An act to provide for retirement of Justices of the Supreme Court', and to that end I hereby retire from regular active service on the bench—this retirement to be effective on and after the 2d day of June 1937, that being the day next following the adjournment of the present term of the Court.

I have the honor to remain,

Very respectfully yours,

WILLIS VAN DEVANTER."

(Congressional Record, Volume 81, Part 7, page 8074.)
and thereafter on or about June 2, 1937, Mr. Justice Van Devanter retired from regular active service on the bench under the provisions of said Section 375a.

7. That on August 12, 1937, the President of the United States sent the following message to the Senate of the United States:

"The White House, *August 12, 1937.*

To the Senate of the United States:

I nominate HUGO L. BLACK, of Alabama, to be an Associate Justice of the Supreme Court of the United States.

FRANKLIN D. ROOSEVELT."

(Congressional Record, Volume 81, Part 8, Page 8769), and on August 17, 1937 the Senate confirmed the nomination of the Honorable Hugo L. Black to be an Associate Justice of the Supreme Court of the United States (Congressional Record, Volume 81, Part 8, Page 9103), and since October 4, 1937, the Honorable Hugo L. Black has sat as an Associate Justice of the Supreme Court of the United States.

8. That the Honorable Hugo L. Black was duly elected United States Senator from Alabama for a six year term ending January 3, 1939 and at the time of the adoption by the Senate of said Section 375a of Title 28 he was serving as such Senator and voted in favor of the adoption of said Section 375a of Title 28 (Congressional Record, Volume 81, No. 40, Page 2055).

9. That in the above entitled case the Honorable Hugo L. Black sat as an Associate Justice of the Supreme Court in the consideration and decision thereof and rendered an opinion which was concurred in by Chief Justice Hughes, Mr. Justice Reed and Mr. Justice Frankfurter, a majority of the Court. A dissenting opinion was also rendered which was concurred in by Mr. Justice McReynolds, Mr. Justice Butler and Mr. Justice Roberts. Mr. Justice Stone took no part in the consideration or decision of this case.

10. That under the provisions of Section 6 of Article I of the Constitution of the United States, the Honorable Hugo L. Black was not qualified to sit on the Supreme Court of the United States in the consideration and decision of this case, and the Respondent has sustained or is immediately in danger of sustaining direct and material injury by reason thereof, in that under the provisions of the judgment of this Court entered on February 27, 1939, she will not be entitled to recover the moneys in question in said case and will be obligated to pay the costs chargeable against the losing party in said case, and that had the Honorable Hugo L. Black not been sitting in the consideration and decision of this case, this Court would have been evenly divided as to the determination of the issues in this case, in which event the judgment of this Court would have been to sustain the judgment of the Circuit Court of Appeals for the Seventh Circuit which was in favor of the Respondent and that unless this motion be granted she will be deprived of property without due process of law in violation of the Fifth Amendment to the Constitution.

11. That on February 27, 1939, for the first time, the matters and things set forth above in support of this motion became material for a determination of the issues of this case.

WHEREFORE, the Respondent respectfully prays that it be determined by this Court (1) that the Honorable Hugo L. Black served as an Associate Justice of the Supreme Court in the consideration and decision of this cause in violation of Section 6 of Article I of the Constitution of the United States, (2) that the judgment of this Court entered in this cause on February 27, 1939 was therefore in violation of the Fifth Amendment of the Constitution of the United States, (3) that the judgment entered herein on February

27, 1939 should be set aside and that judgment should be entered herein confirming the judgment of the Circuit Court of Appeals of the Seventh Circuit, and (4) that no mandate issue in this cause until this motion is disposed of.

Respectfully submitted:

HUGH W. McCULLOCH,
Counsel for Respondent

NED P. VEATCH,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 391 and 482.—OCTOBER TERM, 1938.

The United States of America, Petitioner, 391 vs. Elizabeth C. Jacobs, Executrix of the Last Will and Testament of W. Francis Jacobs, Deceased.	On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the Seventh Circuit.
Edward Jordan Dimock, as Substi- tuted Executor of the Last Will and Testament of Henry C. Folger, De- ceased, etc., Petitioner, 482 vs. Walter C. Corwin, Late Collector of Internal Revenue, First District of New York.	On Writ of Certiorari to the United States Cir- cuit Court of Appeals for the Second Circuit.

[February 27, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

No. 391.

The question is whether the entire value or only one-half the value of real property—purchased by a decedent with his own funds and held at his death by his wife and himself under a joint tenancy set up prior to 1916—may be included in the decedent's gross estate under the 1924 Revenue Act.

In 1909, real estate in Illinois was conveyed to W. Francis Jacobs, the decedent, and Elizabeth C. Jacobs, his wife, "as joint tenants" and this joint tenancy continued until decedent's death; the wife never contributed any part of, or consideration for, the joint property; decedent died June 17, 1924 (after the effective date of the 1924 Revenue Act), and as survivor the wife became sole owner in fee of the whole of the joint property.

The Commissioner included the full value of the property in decedent's gross estate for taxation under the 1924 Act. As executrix,

respondent paid the tax, and sought recovery in the District Court which held that the estate tax could be imposed only upon one-half of the joint property's total value. The Circuit Court of Appeals affirmed.¹

Respondent construes the 1924 Revenue Act as taxing—by its terms—only one-half the value of the joint property, and contends that inclusion of the property's entire value for estate tax purposes would as retroactive taxation violate the Due Process Clause of the Fifth Amendment.

First. It is clear that Congress intended, by Section 302 of the 1924 Act,² to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety—irrespective of the date of the tenancy's creation—insofar as the property or consideration therefor is traceable to the decedent. Subdivision (h) of Section 302 specifically provided that the provisions of 302 relating to joint tenancies should “apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as . . . described therein, whether made, created, arising, existing, exercised, or relinquished *before or after the enactment of this Act.*” (Italics supplied.) Section 302(h) was enacted in the 1924 Act after this Court, on May 1, 1922, had decided that the 1916 Act did not purport to impose an estate tax measured by the value of property held in joint tenancies created prior to the 1916 Act.³ “The clear language of the 1924 stat-

¹ 97 F. (2d) 784.

² The 1924 Act imposed a tax (Sec. 301, Act of 1924, 43 Stat. 253, 303) “upon the transfer of the net estate of every decedent dying after” the Act's enactment, and included (Sec. 302) in each gross estate the value of “the interest . . . [in property] held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, . . . except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person”

³ *Schwab v. Doyle*, 258 U. S. 529, 535; *Knox v. McEligott*, 258 U. S. 546, 549. Respondent relies upon language of the *Knox* case to support the contention that Sec. 302 of the 1924 Act is retroactive in its effect on joint tenancies such as the one here. However, the actual judgment of the Court in that case went no further than to hold that the terms of the 1916 Act there considered did not require the inclusion—in gross estates—of the value of property held in joint tenancies created prior to the enactment of that particular law.

ute repels the notion that it has no application to joint tenancies created prior to September 8, 1916."⁴

Second. Here, decedent paid the entire purchase price of the joint property with his own individual funds and, therefore, the 1924 statute required the inclusion of the full value of the joint property in his gross estate. Contending that the tax as so applied is retroactive, respondent insists that the Due Process Clause of the Fifth Amendment forbids such taxation. The reasoning is that a one-half interest in the joint property was transferred to, and vested in the wife in 1909; that the tax in question only applies to transfers; and that the one-half interest transferred to the wife in 1909 could not thereafter (1924) be taxed as a part of decedent's gross estate without retroactively applying the tax to the 1909 transfer.

But the tax was not levied on the 1909 transfer and was not retroactive. At decedent's death in 1924, ownership and beneficial rights in the property which had existed in both tenants jointly changed into the single ownership of the survivor. This change in ownership, attributable to the special character of joint tenancies, was made the occasion for an excise, to be measured by the value of the property in which the change of ownership occurred. Had the tenancy not been created, this survivorship and change of ownership would not have taken place, but the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.⁵

Death duties or excises imposed upon the occasion of change in legal relationships to property brought about by death are ancient in origin.⁶ Congress has the power to levy a tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a co-tenant. In holding that the full value of an estate by the entirety may constitutionally be included in a decedent's gross estate for estate tax purposes, this Court said: "The question . . . is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into

⁴*Gwinn v. Commissioner*, 287 U. S. 224, 226; *cf.*, *Phillips v. Dime Trust & S. D. Co.*, 284 U. S. 160, 166.

⁵*cf.*, *Reynolds v. United States*, 292 U. S. 443, 449; *Cox v. Hart*, 260 U. S. 427, 435.

⁶*See*, *Knowlton v. Moore*, 178 U. S. 41, 47, 1 *Cooley*, "Taxation", § 48, (4th ed.), *Seligman*, "Essays in Taxation", Ch. V, (9th ed., 1921).

being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights

"At . . . [the co-tenant's] death, however, and because of it, . . . [the survivor] for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax."⁷

Thereafter, it was further decided that the full value of the property passing to a survivor under a tenancy by the entirety created prior to the estate tax of 1916 could be included in the gross estate.⁸ Congress—it has been held—may also constitutionally apply an estate tax to the whole of a joint tenancy created after the 1916 Act,⁹ and to half of a joint tenancy created prior to the 1916 Act, where the decedent alone had furnished consideration for the joint property.¹⁰

It is urged that these decisions do not support the tax here upon the full value of the joint property, because this tenancy was created prior to the estate tax law of 1916. Respondent relies upon differences in the nature of tenancies by the entirety and joint

⁷ *Tyler v. United States*, 281 U. S. 497, 503, 504.

⁸ *Third National Bank & Trust Co. v. White*, 45 F. (2d) 911, affirmed 287 U. S. 577; *Helvering, Commissioner v. Bowers*, 303 U. S. 618.

⁹ *Foster v. Commissioner*, 303 U. S. 618.

¹⁰ *Gwinn v. Commissioner, supra*; *Griswold v. Helvering*, 290 U. S. 56, 63. In the *Griswold* case this Court said: "Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at an earlier date, which furnishes the basis for the tax."

tenancies in order to remove the present case from the application of these prior adjudications. Since a joint tenant's interest in realty is severable and subject to sale, the argument is that upon the death of a co-tenant the survivor actually receives nothing more than the decedent's one-half interest and therefore no more can be subjected to a death duty. On the other hand, respondent explains the permissible taxation of the whole of a tenancy by the entirety by reference to the "amiable fiction"¹¹ of the common law, under which ownership of a husband and wife in tenancy by the entirety is deemed a single individual unity and each owns all and every part of the property so held. By virtue of this feudal fiction of complete ownership in each of two persons, the surviving tenant by the entirety is conceived to be the recipient of all the property upon the death of the co-tenant, and therefore—it is said—all the property can be taxed.

The constitutionality of an exercise of the taxing power of Congress is not to be determined by such shadowy and intricate distinctions of common law property concepts and ancient fictions.¹² The Constitution grants Congress the "Power to lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare." No more essential or important power has been conferred upon the Congress and the presumption that an Act of Congress is valid applies with added force and weight to a levy of public revenue.¹³

In addition, there is sufficient substantial similarity between joint tenancies and tenancies by the entirety to have moved Congress to treat them alike for purposes of taxation. Practical necessities—and taxation is "eminently practical"¹⁴—may well have led Congress to group different types of joint ownership together for tax-

¹¹ Cf., *Tyler v. United States*, *supra*, at 503.

¹² A joint tenancy in Illinois—where the property involved here is located—is described by that State's highest Court (as in the common law) as follows: "The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and the unity of possession; or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time and held by one and the same undivided possession." *Deslauriers v. Senesac*, 331 Ill. 437, 440. The "learning in the books merely shows that in case of a conveyance to husband and wife, there is a *fifth* unity, to wit: that of person" *Topping v. Sadler, V Jones* (No. Car.) 357, 360. See note, 30 L. R. A. 305.

¹³ *Nicol v. Ames*, 173 U. S. 509, 515.

¹⁴ *Id.*, 516.

tion rather than to afford different treatment to each varying shade of such ownership. A tenancy by the entirety "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person."¹⁵ Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. The "grand incident of joint estate is the doctrine of survivorship, 'by which, when two or more persons are seized of a joint estate, . . . the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it may be'."¹⁶

While it is true that until the death of decedent here each joint tenant possessed the right to sever the joint tenancy, each was nevertheless subjected to the hazard of losing the complete estate to the other as survivor. Prior to decedent's death, his wife had no right to dispose of her interest by will, nor could it pass to her legal heirs. She might survive and thereby obtain a complete fee to the property with attendant rights of possession and disposition by will or otherwise. Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains. Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest,¹⁷ a decided change for the survivor's benefit. This termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax. Neither the amount of the tax nor its application to the survivor's change of status and ownership, was in any manner dependent upon the date of the joint tenancy's creation, whether before, or after, 1916. It is immaterial that Congress chose to measure the amount of the tax by a percentage of the total value of the property, rather than by a part, or by a set sum for each such change. The wisdom both of the tax and of its measurement was for Congress to determine.

¹⁵ 1 Tiffany, "Real Property" (1920), § 194; see, Littleton's "Tenures," § 291 (Wambaugh, ed., 1903).

¹⁶ Freeman, "Cotenancy and Partition," 2nd ed., § 12.

¹⁷ Cf., *Chase Nat. Bank v. United States*, 278 U. S. 327, 338; *Saltonstall v. Saltonstall*, 276 U. S. 260, 271.

No. 482.

No. 482 involves provisions of the 1926 Revenue Act (44 Stat. 9) substantially identical to those of the 1924 Act considered above. Here, also, a joint tenancy (in personal property) was created by man and wife prior to 1916. However, not all of the joint property was contributed by the decedent, but a portion was contributed to the tenancy by the wife who survived. This property which she transferred to the tenancy had in turn been previously given to her—without consideration—by decedent before the creation of the joint tenancy. At decedent's death in 1930, an estate tax was assessed and paid upon the full value of the joint property, including that part contributed by the survivor but ultimately traceable to the decedent.

The District Court held that the full value of the joint property was taxable,¹⁸ and the Circuit Court of Appeals affirmed.¹⁹

The contention that the 1926 tax is unconstitutional under the Fifth Amendment because imposed upon the total value of the joint tenancy at decedent's death is without merit, for reasons stated in No. 391.

However, there is here the further argument that the courts below erred in constraining the 1926 Act to require the inclusion in the gross estate of that part of the joint property (shares of stock) contributed to the joint tenancy by the survivor, but which had been paid for and given to her by decedent prior to the creation of the tenancy.

Although subdivision (h) of Section 302 of the 1926 Act specifically required inclusion in the gross estate of the full value of the joint property at death in proportion to the decedent's contribution to the purchase price, petitioner relies upon that part of subdivision (e) which excepts "such part [of the joint property] . . . as may be shown to have originally belonged to . . . [the survivor] and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth." Petitioner insists that this exception should be read "except such parts thereof as may be shown to have originally belonged to [the survivor] and never *after the passage of this Act* to have been received or acquired by the latter

¹⁸ 19 F. Supp. 56.

¹⁹ 99 F. (2d) 799.

from the decedent for less than an adequate and full consideration in money or money's worth."

The surviving joint tenant in this case comes squarely within the governing statutory provision because she "received" and "acquired" all of the property contributed by her to the joint tenancy "from the decedent for less than an adequate and full consideration in money or money's worth." This language adopted by Congress clearly and unambiguously indicates the purpose to tax the entire value of a joint tenancy under circumstances shown by this record. We are without authority to add language to the statute directly contrary to such a clearly expressed purpose.

The judgment in No. 391 is reversed and that in No. 482 is affirmed.

Mr. Justice STONE took no part in the consideration or decision of these cases.

A true copy.

Test :

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 391 and 482.—OCTOBER TERM, 1938.

**The United States of America,
Petitioner,**

391 vs.
Elizabeth C. Jacobs, Executrix of the
Last Will and Testament of W.
Francis Jacobs, Deceased, Respond-
ent.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Seventh Circuit.

Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, Deceased, etc., Petitioner.

482 *vs.*
Walter C. Corwin, Late Collector of
Internal Revenue, First District of
New York.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Second Circuit.

[February 27, 1939.]

Mr. Justice McKEYNOLDS, Mr. Justice BUTLER, and Mr. Justice ROBERTS think that the judgment in No. 391 should be affirmed and that in No. 482 should be reversed.

It has long been the settled doctrine of this court that Congress cannot retroactively tax, as testamentary, a transfer consummated in accordance with existing law before the adoption of a system of estate taxation, and where the parties, at the time of the transaction, had no notice of intent to tax it as a transfer in contemplation of death or to take effect in possession or enjoyment at or after death.¹ In order to avoid holding taxing acts unconstitutional on this ground, the court has often construed them as applying prospectively only.² Reliance is placed by the government on decisions

¹Nichols v. Coolidge, 274 U. S. 531; Helvering v. Helmholtz, 296 U. S. 93, 97; White v. Poor, 296 U. S. 98, 102.

² *Shwab v. Doyle*, 258 U. S. 529; *Knox v. McElligott*, 258 U. S. 5
Trust Co. v. Wardell, 258 U. S. 537; *Lery v. Wardell*, 258 U. S. 542;
v. Frick, 268 U. S. 238.

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sustaining inclusion in the estate of one spouse of the entire value of an estate by the entirety. In the earlier cases wherein the action was upheld the act operated prospectively and affected only such an estate arising after passage of the statute,³ or the estate came into being after the adoption of a system of taxation which might well include such a transfer within its scope.⁴ Subsequently the inclusion of the entire value in the taxable estate of one spouse was sustained where the tenancy by the entirety antedated the passage of the estate tax acts.⁵ The decision was based upon the peculiar nature of a tenancy by the entirety as expounded in *Tyler v. United States*. A transfer tax measured by one-half the value of an estate in joint tenancy has been approved although the estate was created prior to the adoption of the system of estate taxes;⁶ but the court has never passed upon the validity of such a tax measured by the value of the entire joint estate. There are marked differences between a tenancy by the entirety and a joint tenancy in respect of the power of one tenant to destroy the joint estate, to transfer or encumber his interest and otherwise obtain the fruits of it. In order to prevent evasion Congress may include the value of the entire estate in the gross estate as a measure of the tax where the estate originates after adoption of the law.⁷ But it may not retroactively apply such measure to an estate created at a time when its creators had no reason to expect that such a tax would be laid in view of the settled rules of property.

³ *Tyler v. United States*, 281 U. S. 497.

⁴ *Phillips v. Dime Trust & Safe Deposit Co.*, 284 U. S. 160.

⁵ *Third National Bank & Trust Co. v. White*, 287 U. S. 577; *Helvering v. Bowers*, 303 U. S. 618.

⁶ *Knox v. McElligott*, *supra*; *Gwinn v. Commissioner*, 287 U. S. 224; *Cahn v. United States*, 297 U. S. 691.

⁷ See *Nichols v. Coolidge*, *supra*, p. 542; *Tyler v. United States*, *supra*, p. 505; *Helvering v. City Bank Co.*, 296 U. S. 85, 90.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 482

**EDWARD JORDAN DIMOCK, AS SUBSTITUTED EX-
ECUTOR OF THE LAST WILL AND TESTAMENT
OF HENRY C. FOLGER, DECEASED, ETC., PETI-
TIONER,**

vs.

**WALTER C. CORWIN, LATE COLLECTOR OF INTER-
NAL REVENUE, FIRST DISTRICT OF NEW YORK**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED NOVEMBER 22, 1938.

CERTIORARI GRANTED JANUARY 3, 1939.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 482

EDWARD JORDAN DIMOCK, AS SUBSTITUTED EX-
ECUTOR OF THE LAST WILL AND TESTAMENT
OF HENRY C. FOLGER, DECEASED, ETC., PETI-
TIONER,

vs.

WALTER C. CORWIN, LATE COLLECTOR OF INTER-
NAL REVENUE, FIRST DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

1

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,

Plaintiff-Appellant,

No. L-6839.

against

2

WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York,
Defendant-Appellant.

Statement Under Rule 13.

This is an appeal by the plaintiff above named from a judgment made and entered in the office of the Clerk of the United States District Court for the Eastern District of New York, on March 21, 1938, in the above entitled case in favor of the plaintiff, Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, against the defendant, Walter C. Corwin, late Collector of Internal Revenue for the First District of New York, in the sum of \$2,483.96, with interest thereon from May 17, 1933, and costs, as taxed, in the sum of \$26.

3

This action was commenced on August 28, 1935, by the original plaintiff herein, Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, by the filing of a notice of appearance and complaint and the

4

Statement Under Rule 13.

issuance of a summons. The defendant filed an answer on April 21, 1936. Emily C. J. Folger, the original plaintiff having died on February 21, 1936, an order, dated May 1, 1936, was made and entered herein substituting Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, as plaintiff herein, in the place and stead of the deceased, Emily C. J. Folger, and by such order the complaint was amended so as to allege the death of said original plaintiff and the qualification of said Edward Jordan Dimock, as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, and as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased.

5

Issue was rejoined herein on May 5 upon the filing of the defendant's amended answer. The plaintiff served and filed a note of issue and notice of trial on May 7, 1936.

On November 17, 1936, this case was tried before Honorable Mortimer W. Byers without a jury, a jury having been waived by written stipulation of the parties. Judge Byers reserved decision.

6

On April 14, 1937, Judge Byers rendered his decision in favor of the plaintiff but for only a portion of the amount sued for. On February 8, 1938, Judge Byers filed a memorandum requesting counsel to submit findings of fact and conclusions of law in accordance with his opinion of April 14, 1937.

On February 17, 1938, an order was made and filed by Honorable Grover M. Moscovitz, upon the stipulation of the parties, amending certain paragraphs of the complaint so as to make them conform to the proof.

Statement Under Rule 13.

7

On March 15, 1938, findings of fact and conclusions of law signed by Judge Byers on March 14, 1938, were filed, together with plaintiff's requests for conclusions of law. Judge Byers refused to pass upon said requests and allowed exceptions to the plaintiff to certain conclusions of law made by the court and to the court's refusal to pass upon plaintiff's requests for conclusions of law. On the same day, the defendant's requests for findings of fact and conclusions of law were filed. This Judge Byers also refused to pass upon and allowed exceptions to the defendant to certain of the court's findings of fact and conclusions of law and to Judge Byers' refusal to pass upon the defendant's requests for findings of fact and conclusions of law.

8

On March 21, 1938, costs were taxed in the sum of \$26 and judgment was entered by the plaintiff in the sum of \$2,483.96 with interest thereon from May 17, 1933, plus costs as taxed in the sum of \$26.

On May 27, 1938, an appeal was allowed plaintiff from the said judgment of March 21, 1938 and on June 1, 1938, an appeal was allowed defendant from the said judgment of March 21, 1938.

9

There was no arrest, attachment or reference herein.

Plaintiff has appeared throughout the proceedings in the above entitled action by Hawkins, Delafield & Longfellow, Esqs. The defendant has been represented in the proceedings in the District Court up to December 25, 1937, by Leo J. Hickey, Esq., former United States attorney for the Eastern District of New York and was represented by Harold St. L. O'Dougherty, United States Attorney for the Eastern District of New York, from December 27, 1937 to May 9, 1938, and now is represented by Michael F. Walsh, United States Attorney for the Eastern District of New York.

Docket Entries.

1935 *Filings, proceedings, etc.*

Aug. 28—Plaintiff's notice of appearance and complaint filed. Summons issued.

Sept. 9—Summons returned and filed—served on defendant.

" 27—Stipulation extending time to answer to and including Oct. 23, 1935.

1936

April 21—Answer filed.

11 " 24—Notice of motion filed to substitute E. J. Dimock as executor, etc., in place of Emily C. J. Folger, executrix, etc.

" 29—Campbell, J., hearing on above motion—submitted.

May 1—By Campbell, J. Order filed and entered substituting Edward Jordan Dimock as executor in place of Emily C. J. Folger, executrix, deceased, etc.

" 5—Amended answer filed.

" 7—Note of issue and notice of trial filed.

12 June 5—Inch, J., case called; marked ready.

Oct. 9—Galston, J., case called; adjourned to October 22, 1936.

" 22—Galston, J., case called; adjourned to November Term, 1936.

Nov. 4—Byers, J., case called; marked ready.

" 13—Byers, J., case called; adjourned to Nov. 17, 1936.

1936

" 17—Byers, J., case called; trial ordered and concluded; jury waived on stipulation; decision reserved; briefs to be submitted Jan. 15, 1937.

Docket Entries.

13

1937

Jan. 15—By Byers, J., order filed and entered extending time to file papers to Jan. 27, 1937.

Apr. 15—Stenographer's minutes filed.

“ 15—By Byers, J., decision rendered with judgment in favor of plaintiff.

“ 15—Settle order (see opinion book).

1938

14

Feb. 8—By Byers, J., memo. filed in connection with proposed findings submitted for signature (in file).

“ 17—By Moscovitz, J., order filed amending certain paragraphs of complaint.

Mar. 15—Two sets of Findings of Fact and Conclusions of Law and Exceptions filed; judgment for the sum of \$2,483.96 with interest from May 17, 1933.

Mar. 21—Bill of costs filed with costs taxed at \$26.00.

15

“ 21—Judgment favor of plaintiff for \$2,483.96 plus interest from May 17, 1933, plus costs taxed at \$26.00 filed.

May 27—Petition for appeal and order allowing appeal, assignment of errors and bond for costs on appeal filed.

June 1—Notice of appeal, order allowing appeal and assignment of errors filed.
Citation filed.

“ 2—Citation filed.

16

Summons.

DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF NEW YORK.

EMILY C. J. FOLGER, as Execu-
trix of the Last Will and Tes-
tament of HENRY C. FOLGER,
deceased,

Plaintiff,

against

L-6839.

17

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District, New York,
Defendant.

To the above-named Defendant:

18

You are hereby summoned to answer the com-
plaint in this action, and file your answer and
serve a copy thereof on the plaintiff's attorneys
within twenty days after the service of this sum-
mons, exclusive of the day of service; and in case
of your failure to appear, or answer, judgment
will be taken against you by default for the re-
lief demanded in the complaint.

WITNESS, the Honorable Marcus B. Camp-
bell, Judge of the District Court of
(L. S.) the United States for the Eastern
(Seal) District of New York, at the Borough
of Brooklyn this 28th day of August
in the year one thousand nine hun-
dred and thirty-five.

PERCY G. B. GILKES,
Clerk.

By S. R. FEUER,
Deputy Clerk.

*Complaint as Amended by Orders, dated May 1, 19
1936, and February 17, 1938.*

HAWKINS, DELAFIELD & LONGFELLOW,
Plaintiff's Attorneys,
Office and Post Office Address,
49 Wall Street,
Borough of Manhattan,
New York City, N. Y.

*Complaint as Amended by Orders dated May
1, 1936, and February 17, 1938.* 20

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839.

21

Plaintiff above named, by Hawkins, Delafield
& Longfellow, her attorneys, complaining of the
defendant, alleges:

22 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

23 FIRST: That on the 11th day of June, 1930, Henry C. Folger, then a resident of the County of Nassau and State of New York, died leaving a Last Will and Testament which was thereafter and on the 25th day of June, 1930, duly admitted to probate by the Surrogate's Court of Nassau County; that in and by said Last Will and Testament plaintiff was nominated and appointed the executrix thereof, that she duly qualified as such executrix in conformity with the laws of the State of New York; that letters testamentary were duly issued to her as such executrix by said Surrogate's Court of Nassau County on the 25th day of June, 1930, and that she has been at all times since said date last mentioned and still is acting as executrix of and under said Last Will and Testament.

24 SECOND: That plaintiff is the widow of said Henry C. Folger, deceased, and at all times herein mentioned was a citizen of the State of New York and a resident and inhabitant of the County of Nassau, State of New York, which is within said Eastern District of New York.

THIRD: Upon information and belief that the defendant at all times from January 2, 1930 to and including August 20, 1933, was the Collector of Internal Revenue for the First District of New York, and during all that time was and still is a resident and inhabitant of the County of Kings, State of New York, which is in the said Eastern District of New York.

FOURTH: That this is a suit of a civil nature at law and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 25

and that this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

(A) DEATH BENEFIT

FIFTH: On information and belief, that said Henry C. Folger was on July 1, 1926 Chairman of the Board of Directors of the Standard Oil Company of New York, a New York corporation, and on that day said Standard Oil Company of New York made effective a so-called "plan for annuities and insurance" as amended, a copy of which is hereto annexed, marked Exhibit A, and by reference thereto made a part hereof. 26

SIXTH: On information and belief, that said Henry C. Folger thereafter and prior to the commencement of this action became an annuitant under said plan for annuities and insurance by retirement on February 29, 1928, and under and by virtue thereof was entitled to designate in writing the name of a beneficiary or beneficiaries to whom death benefits were to be paid. 27

SEVENTH: On information and belief, that at the time of the death of said Henry C. Folger, he was receiving an annuity of \$81,500 payable in equal monthly installments and had designated his wife, Emily C. J. Folger, as the beneficiary to whom death benefits were to be paid, and that after his death, and on the first day of each and every month commencing August 1, 1930, pursu-

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ant to such plan and designation, said Emily C. J. Folger received from said Standard Oil Company of New York, as a death benefit under said plan and in equal monthly installments of \$6,967.67 each the total sum of \$81,500, being an amount equal to an annuity for one year.

- 29 EIGHTH: On information and belief the Commissioner of Internal Revenue in purporting to determine the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended improperly included as part of the gross and net estates of said Henry C. Folger the sum of \$79,791.63, being the value as of the date of the death of said Henry C. Folger of the right to receive said death benefit of \$81,500 in equal monthly installments for twelve months.

- 30 (B) WHOLE OF JOINT ESTATE TAXED ALTHOUGH
CREATED PRIOR TO ESTATE TAX ACTS

NINTH: That at the time of the death of said Henry C. Folger, he and said Emily C. J. Folger were the owners of shares of stock of certain corporations as joint tenants and not as tenants in common, under and pursuant to the laws of the State of New York, which had been registered upon the books of the corporations issuing the same, at the direction of said Henry C. Folger and Emily C. J. Folger, while both were residents of the State of New York, in such names and in such form as said Henry C. Folger and Emily C.

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J. Folger directed; the names of the corporations whose stock was so owned, the market value at the date of the decedent's death and the number of shares of each kind of stock, the names in which the shares were registered and the forms of the registrations being set forth upon a schedule hereto annexed, marked Exhibit B, and by reference thereto made a part hereof.

TENTH: On information and belief, that the shares of stock jointly held by said Henry C. Folger and Emily C. J. Folger, as alleged in paragraph Ninth hereof, were of a value upon the date of death of said Henry C. Folger of \$3,773,-661.06. 32

ELEVENTH: On information and belief, that all of the shares of stock, with respect to which Exhibit B hereto annexed shows the names in which the shares were registered and the forms of registration, had either been registered in said names and in said forms of registrations upon the books of the several corporations whose stock they represented, for a period commencing prior to the 9th day of September, 1916, or else represented stock dividends or stock purchased pursuant to rights to subscribe issued with respect to shares of stock so registered for a period commencing prior to the 9th day of September, 1916, so that a joint tenancy in the same was created prior to the passage of any Federal Estate Tax Law, the dates of original registration of such shares in said names and forms, the names of the persons contributing them where ascertainable, the dates 33

34 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

and amounts of subsequent increases thereof by stock dividends and the exercise of rights to subscribe, the amounts of cash paid in such exercise and the then market values of the shares and rights at the time of such exercise being shown upon a schedule hereto annexed, marked Exhibit C, and by reference thereto made a part hereof.

35 TWELFTH: On information and belief that the law of the State of New York covers the tenancy and incidents of the tenancy created in the stock listed upon Exhibit B.

36 THIRTEENTH: On information and belief, that notwithstanding the foregoing facts, the Commissioner of Internal Revenue in purporting to determine the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended improperly included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06 instead of only \$1,886,830.53, being one-half thereof.

(C) CONTRIBUTION OF THE SURVIVING JOINT TENANT TOWARD THE PURCHASE OF JOINTLY OWNED PROPERTY

FOURTEENTH: That heretofore and prior to May 29th, 1912, Emily C. J. Folger acquired 251 shares of the capital stock of the Standard Oil Company of New York, which shares were either given to her by the decedent, Henry C. Folger or were derived from property given to her by him.

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 37

FIFTEENTH: That heretofore and prior to March 10th, 1914, Emily C. J. Folger acquired 656½ shares of the capital stock of the Standard Oil Company (California), which shares were either given to her by the decedent, Henry C. Folger, or were derived from property given to her by him.

SIXTEENTH: That heretofore and on or about February 9th, 1916, Emily C. J. Folger contributed to a joint account entitled "Henry C. Folger and Emily C. J. Folger, or the survivor" 250 of the said 251 shares of the capital stock of the Standard Oil Company of New York, as is shown upon item 13 of the schedule hereto annexed, marked Exhibit C, and by reference thereto made a part hereof, which said shares so contributed or the derivatives thereof, as appears from said Exhibit C, had a market value of \$126,791.14 at the date of the death of the decedent Henry C. Folger. 38

SEVENTEENTH: That heretofore and on or about the dates hereinafter set forth Emily C. J. Folger contributed to a joint account entitled "H. C. Folger and Emily C. J. Folger or the survivor" the said 656½ shares of the capital stock of the Standard Oil Company (California), as follows: 39

On or about February 9th, 1915.. ½ share

On or about February 24th, 1916 656 shares

which said shares so contributed, as is shown upon item 16 of the schedule hereto annexed, marked Exhibit C, and by reference thereto made a part hereof, or the derivatives thereof as appears from

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said Exhibit C, had a market value of \$719,981.01 at the date of the death of the decedent, Henry C. Folger.

41 EIGHTEENTH: On information and belief, that notwithstanding the foregoing facts, the Commissioner of Internal Revenue in purporting to determine the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended improperly included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06 instead of allowing a credit against the said sum, the amounts contributed to the jointly owned property, viz., \$846,772.15, the sum of the amounts set forth in paragraphs Sixteenth and Seventeenth above.

(D) TAX PROCEEDINGS

42 NINETEENTH: That pursuant to the provisions of the Revenue Act of 1926 and the amendments thereto, plaintiff, as executrix as aforesaid, on or about the 8th day of June, 1931, duly made and executed the return for the Estate Tax on the estate of said Henry C. Folger, deceased, on form No. 706 furnished by the defendant, the Collector of Internal Revenue for the First District of New York, for that purpose, and duly filed the same in duplicate on or about the 9th day of June, 1931, in the office of said defendant, the Collector of Internal Revenue for the First District of New York.

TWENTIETH: That thereafter and on or about the 9th day of June, 1931, the plaintiff, as ex-

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ecutrix as aforesaid, paid to the Collector of Internal Revenue for the First District of New York as and for Estate Tax \$43,611.18, the amount indicated as due with respect to the net estate deemed by her to be shown upon the face of said return, less a credit of 80% thereof for State Inheritance Taxes.

TWENTY-FIRST: That the net estate deemed by plaintiff to be shown upon the face of the said return amounted to \$2,814,144.52. 44

TWENTY-SECOND: That thereafter and on or about the 3rd day of May, 1933, the Commissioner of Internal Revenue, purporting to act by virtue of authority vested in him under said Revenue Act of 1926 as amended, reviewed and audited said return and made certain increases in the amount of the estate of Henry C. Folger, deceased, and assumed to impose an additional assessment against said estate under the Act aforesaid which increased the amount of the net estate to \$4,891,646.99, by adding to the amount of the net estate deemed by the plaintiff to be shown upon the face of the return the amounts, among others (a) of the death benefit from the Standard Oil Company referred to in paragraph Seventh hereof, and amounting to \$79,791.63, and (b) one-half of the value of stocks jointly owned under a tenancy created prior to the passage of any Federal Estate Tax Law, referred to in Paragraph Thirteenth hereof, and amounting to \$1,886,830.53. 45

TWENTY-THIRD: On information and belief, that said Commissioner of Internal Revenue, in as-

46 *Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938.*

suming to assess an additional estate tax based upon said increase in the amount of the net estate, credited against said estate tax, to the extent of 80% thereof, the amount of state estate, inheritance, legacy and succession taxes which have been paid in respect of property included in the gross estate.

47 TWENTY-FOURTH: On information and belief, that the tax thus assessed upon a basis of such increase and after giving effect to such credit amounted to \$54,054.94, of which the sum of \$51,615.58 resulted from the inclusion of the items: (a) the death benefit of the Standard Oil Company and (b) the whole of the value of stocks jointly owned under a tenancy created prior to the passage of any Federal Estate Tax law, in so far as the same exceeded the value of one-half thereof, all hereinbefore referred to, and amounting in total to \$1,966,622.16.

48 TWENTY-FIFTH: That thereafter and on or about the 3rd day of May, 1933, the defendant Walter E. Corwin, Collector of Internal Revenue for the First District of New York, demanded of the plaintiff payment of said sum of \$54,054.94, with interest thereon from the 11th day of June, 1931, to the 26th day of April, 1933, amounting to \$6,077.85, all as and for a claimed estate tax with interest thereon.

TWENTY-SIXTH: That thereafter and on or about the 17th day of May, 1933, the plaintiff paid to the said Walter E. Corwin, Collector of Internal

Complaint as Amended by Orders, dated May 1, 1936, and February 17, 1938. 49

Revenue for the First District of New York, the sums of \$54,054.94 and \$6,077.85, in response to said demand, involuntarily and solely to escape the pains and penalties provided for failure to pay the same and under protest that the purported tax and interest were erroneous, excessive and illegal in whole and in part.

TWENTY-SEVENTH: That thereafter and on or about the 8th day of July, 1933, the plaintiff filed with the defendant on Form 843 furnished by the defendant, a claim for the refund of Fifty-two Thousand Thirty-five and 41/100 Dollars (\$52,035.41), with interest of Six Thousand Seventy-seven and 85/100 Dollars (\$86,077.85), of which sums the amount of Fifty-one Thousand Six Hundred Fifteen and 58/100 Dollars (\$51,615.58) represented the tax on the amount of the items set forth in paragraph "TWENTY-FOURTH" above, and Five Thousand Eight Hundred Three and 57/100 Dollars (\$5,803.57) represented interest upon such tax to May 17, 1933, but on the 12th day of September, 1933, the Commissioner of Internal Revenue rejected the same. 50 51

TWENTY-EIGHTH: That, by reason of the foregoing, the defendant is indebted to the plaintiff in the sum of Fifty-one Thousand Six Hundred Fifteen and 58/100 Dollars (\$51,615.58) plus interest thereon in the sum of Five Thousand Eight Hundred Three and 57/100 Dollars (\$5,803.57) making a total of Fifty-seven Thousand Four Hundred Nineteen and 15/100 Dollars (\$57,419.15) with interest thereon from the 17th day of May, 1933.

52 *Exhibit A, Annexed to Foregoing Complaint.*

WHEREFORE, the plaintiff, Edward Jordon Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as executor of the Last Will and Testament of Emily C. J. Folger, deceased, demands judgment against the defendant for the sum of Fifty-seven Thousand Four Hundred Nineteen and 15/100 Dollars (\$57,419.15) with interest thereon from the 17th day of May, 1933.

53 HAWKINS, DELAFIELD & LONGFELLOW,
 Attorneys for Plaintiff,
 Office & P. O. Address,
 49 Wall Street,
 Borough of Manhattan,
 New York City.

Exhibit A, Annexed to Foregoing Complaint.

54 Copy of Standard Oil Company of New York
 "Plan for Annuities and Insurance."

(Printed as part of Findings of Fact at pp.
 77 to 84, inc.)

Exhibit B, Annexed to Foregoing Complaint.

THE FOLLOWING INFORMATION RELATIVE TO JOINTLY OWNED PROPERTY: NAME OF CORPORATION AND KIND OF STOCK, THE DEATH VALUE OF THE WHOLE, THE DEATH VALUE OF THE PROPERTY CONTRIBUTED BY EMILY C. FOLGER, THE SURVIVOR HEREIN, THE NUMBER OF SHARES, THE NAMES WHICH THE SHARES WERE REGISTERED AND THE FORM OF REGISTRATION.

<i>Name of corporation and kind of stock</i>	<i>Death value of whole</i>	<i>Death value of property contributed by Emily C. J. Folger the survivor herein</i>	<i>Number of Shares</i>	<i>Names in which the shares were registered and the form of registration</i>
Indiana Pipe Line Company, capital _____	\$ 107.25	\$ 0.00	3	H. C. Folger and Emily C. J. Folger or the survivor
New York Transit Company, capital _____	40.75	0.00	2	H. C. Folger and Emily C. J. Folger or the survivor
Northern Pipe Line Company, capital _____	43.00	0.00	1	H. C. Folger and Emily C. J. Folger or the survivor
Ohio Oil Company, common _____	318,200.00	0.00	4,000	H. C. Folger and Emily C. J. Folger or the survivor
			300	H. C. Folger Jr. and Emily C. J. Folger or the survivor
Prairie Oil and Gas Co., capital _____	69,720.00	0.00	1,008	H. C. Folger and Emily C. J. Folger or the survivor
			672	H. C. Folger Jr. and Emily C. J. Folger or the survivor
Prairie Pipe Line Co., capital _____	57,330.00	0.00	1,260	H. C. Folger and Emily C. J. Folger or the survivor
Star Refining Company, common _____	130.00	0.00	8	H. C. Folger and Emily C. J. Folger or the survivor
South Penn Oil Company common _____	7,680.00	0.00	192	H. C. Folger and Emily C. J. Folger or the survivor
Standard Oil Company (Indiana) capital _____	533,745.00	0.00	10,440	H. C. Folger and Emily C. J. Folger or the survivor

Exhibit B, Annexed to Foregoing Complaint.

<i>Item</i>	<i>Name of corporation and kind of stock</i>	<i>Death value of whole</i>	<i>Death value of property contrib- uted by Emily C. J. Folger the survivor herein</i>	<i>Number of Shares</i>	<i>Names in which the shares were registered the form of registration</i>
10	Standard Oil Company (Kansas) common —	585.00	0.00	16	H. C. Folger and Emily C. Folger or the survivor
11	Standard Oil Company (Nebraska) common—	1,743.75	0.00	36	H. C. Folger and Emily C. Folger or the survivor
12	Standard Oil Company (New Jersey) common	891,187.50	0.00	12,250	H. C. Folger and Emily C. Folger or the survivor
13	Standard Oil Company of New York capital	279,460.31	126,791.14	8,265	H. C. Folger and Emily C. Folger or the survivor
14	Swan Finch Oil Cor- poration common —	36.00	0.00	4	H. C. Folger and Emily C. Folger or the survivor
15	Swan Finch Oil Cor- poration preferred —	20.00	0.00	1	H. C. Folger and Emily C. Folger or the survivor
16	Standard Oil Company of California, succes- sor to Standard Oil Company (California) common —	1,613,632.50	791,981.01	24,730	H. C. Folger and Emily C. Folger or the survivor joint tenants and not as tenants in common
		<u>\$3,773,661.06</u>	<u>\$918,772.15</u>	<u>63,188</u>	

Exhibit C, Annexed to Foregoing Complaint.

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CONTAINS THE DATES OF THE ORIGINAL PURCHASE OF STOCK REGISTERED IN THE JOINT NAMES AND THE FORM OF REGISTRATION, THE NAMES OF THE PERSONS CONTRIBUTING TO THE PURCHASE OF THE SHARES WHERE ASCERTAINABLE, THE DATES AND AMOUNT OF SUBSEQUENT INCREASES THEREOF BY STOCK DIVIDENDS AND THE EXERCISE OF RIGHTS TO SUBSCRIBE, THE CASH PAID ON SUCH EXERCISE, THE MARKET VALUE OF THE SHARES AND THE MARKET VALUE OF THE RIGHTS AT THE TIME OF SUCH EXERCISE.

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Item 1—Indiana Pipe Line Company

Feb. 5, 1915	Purchased (\$50. par)	1 share
Aug. 15, 1929	Par reduced to \$10. and stock exchanged 3 for 1 (and \$20. cash) Received in lieu of stock held	3 shares
June 11, 1930	Total stock held (\$10. par)	3 shares
	Death value of stock originally acquired prior to Sept. 9, 1916: 3 shares at $35\frac{3}{4}$	\$ 107.25

Item 2—New York Transit Company

Feb. 5, 1915	Purchased (\$100 par)	1 share	63
June 3, 1929	Par reduced to \$10. and stock exchanged 2 for 1 (and \$62. cash) Received in lieu of stock held	2 shares	
June 11, 1930	Total stock held (\$10. par)	2 shares	
	Death value of stock originally acquired prior to Sept. 9, 1916: 2 shares at $20\frac{3}{8}$	\$ 40.75	

Item 3—Northern Pipe Line Company

Feb. 5, 1915	Purchased (\$100. par)	1 share
Apr. 1, 1928	Par reduced to \$50 and stock exchanged 1 for 1 (and \$50 cash) Received in lieu of stock held	1 share

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Exhibit C, Annexed to Foregoing Complaint.

June 11, 1930	Total stock held (\$50. par)	1 share
	Death value of stock originally acquired prior to Sept. 9, 1916:	
	1 share at	\$ 43.00

Item 4—The Ohio Oil Company

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July 13, 1914	Purchased * (\$25. par)	50 shares
Dec. 16, 1914	Purchased * "	25 shares
Feb. 6, 1915	Purchased ** "	1 share
Feb. 21, 1916	Purchased ** "	999 shares
Dec. 30, 1922	Stock dividend * 300%	225 shares
Dec. 30, 1922	Stock dividend ** 300%	3000 "

June 11, 1930	Total stock held (\$25. par)	4300 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	4300 shares at 74	\$ 318,200.00

* Registered u/n "H. C. Folger, Jr. and
Emily C. J. Folger, or the survivor".

** Registered u/n "H. C. Folger and Emily
C. J. Folger or the survivor".

Item 5—The Prairie Oil and Gas Company

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July 20, 1914	Purchased * (\$100. par)	55 shares
Feb. 8, 1915	Purchased * " "	1 "
Sept. 10, 1915	Purchased ** " "	55 "
Mar. 27, 1916	Purchased ** " "	54 "
Feb. 5, 1918	Sold ** " "	25 "
Dec. 20, 1922	Stock dividend * 200%	112 "
Dec. 20, 1922	Stock dividend ** 200%	168 "
Feb. 2, 1925	Par reduced to \$25. and stock exchanged 4 for 1	
	Received in lieu of stock held *	672 "
	Received in lieu of stock held **	1008 "

June 11, 1930	Total stock held (\$25. par)	1680 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	1680 shares at 41½	\$ 69,720.00

* Registered u/n "H. C. Folger, Jr. and
Emily C. J. Folger or the survivor."

** Registered u/n "H. C. Folger and Emily
C. J. Folger or the survivor".

Exhibit C, Annexed to Foregoing Complaint.

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Item 6—The Prairie Pipe Line Company

Feb. 9, 1915	Received as a 150% dividend on the 56 shares of stock of The Prairie Oil and Gas Company (see item 5 above) (\$100. par)	84 shares
Dec. 27, 1922	Stock dividend 200% (\$100 par)	168 shares
		<hr/>
		252
Jan. 12, 1929	Par reduced to \$25. and stock exchanged 4 for 1	
	Received in lieu of stock held	1008 "
Jan. 9, 1929	Stock dividend 25%	252 "
		<hr/>
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	1260 shares at 45½	\$ 57,330.00

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Item 7—The Solar Refining Company

Feb. 6, 1915	Purchased (\$100 par)	1 share
Dec. 25, 1922	Stock dividend 100% (\$100 par)	1 "
Feb. 4, 1929	Par reduced to \$25 and stock exchanged 4 for 1	
	Received in lieu of shares held	8 "
		<hr/>
June 11, 1930	Total stock held (\$25. par)	8 shares
	Death value of stock originally acquired prior to Sept. 8, 1916	
	8 shares at 16¼	\$ 130.00

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Item 8—South Penn Oil Company

June 2, 1914	Purchased (\$100 par)	20 shares
Feb. 28, 1917	Stock dividend 60% (\$100. par)	12 "
Mar. 16, 1926	Par reduced to \$25. and stock exchanged 4 for 1	
	Received in lieu of stock held	128 "
Feb. 7, 1929	Stock dividend 50% (\$25. par)	64 "
		<hr/>
June 11, 1930	Total stock held (\$25. par)	192 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	192 shares at 40	\$ 7,680.00

*Exhibit C, Annexed to Foregoing Complaint.**Item 9—Standard Oil Company (Indiana)*

Apr. 17, 1914	Purchased (\$100 par)	150	share
Apr. 25, 1914	" " "	73	"
May 11, 1914	" " "	30	"
July 14, 1914	" " "	20	"
Aug. 3, 1914	" " "	20	"
Nov. 7, 1914	" " "	50	"
Dec. 23, 1914	" " "	10	"
May 1, 1916	" " "	50	"
		403	"
Jan. 30, 1917	Sold	55	"
		348	"
Dec. 18, 1920	Par reduced to \$25. and stock exchanged 4 for 1		
	Received in lieu of stock held	1392	"
Dec. 18, 1920	Stock dividend 150%	2088	"
Dec. 28, 1922	Stock dividend 100%	3480	"
Feb. 16, 1929	Stock dividend 50%	3480	"
June 11, 1930	Total stock held (\$25 par)	10440	"
	Death value of stock originally acquired prior to Sept. 8, 1916:		
	10440 shares at 51 $\frac{1}{8}$	\$ 532,745.00	

Item 10—Standard Oil Company (Kansas)

Mar. 19, 1915	Purchased (\$100 par)	1	share
Dec. 30, 1922	Par reduced to \$25 and exchanged 4 for 1		
	Received in lieu of stock held	4	shares
Dec. 30, 1922	Stock dividend 300% (\$25 par)	12	"
June 11, 1930	Total stock held	16	"
	Death value of stock originally acquired prior to Sept. 8, 1916:		
	16 shares at 36 $\frac{9}{16}$	\$ 585.00	

Item 11—Standard Oil Company (Nebraska)

Feb. 9, 1915	Purchased (\$100 par)	1	share
Mar. 18, 1915	" " "	1	"

Exhibit C, Annexed to Foregoing Complaint.

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May 15, 1921	Stock dividend 200% (\$100 par)	4 shares
Apr. 12, 1926	* Par reduced to \$25 and exchanged 4 for 1	
	Received in lieu of stock held	24 "
May 6, 1926	Stock dividend 50% (\$25 par)	12 "
June 11, 1930	Total stock held	36 "
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	36 shares at 48 7/16	\$ 1,743.75
	* Certificates actually exchanged on May 21, 1926.	

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Item 12—Standard Oil Company (New Jersey)

May 19, 1914	Purchased (\$100 par)	100 shares
July 17, 1914	" " "	125 "
Aug. 5, 1914	" " "	87 "
Aug. 19, 1915	" " "	25 "
Feb. 18, 1916	" " "	488 "

825 "

Nov. 18, 1919	Sold (\$100 par)	300 "
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225

Dec. 20, 1922	Par reduced to \$25. and stock exchanged 4 for 1	
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**	Received in lieu of stock held	1248 "
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75

**	Received in lieu of stock held	852 "
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Dec. 20, 1922	Stock dividend 400% (\$25 par)	4992 "
	" " " " "	3408 "

10500 "

Mar. 15, 1927	Subscribed to 1750 shares (\$25 par) by exercise of stock rights issued Nov. 26, 1926 at ratio of 1 to 6 and payment of \$25 cash.	
---------------	--	--

Rights quoted at \$2.0625 ea.

Stock quoted at \$37.75

10500 rights at \$2.0625 \$ 21,656.25

Cash 1750 at \$25. 43,750.00

Total cost 1750 shares \$ 65,406.25

Stock purchased by rights 33.11% 579 1/2 shares

Stock purchased by cash 66.89% 1170 1/2 "

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Exhibit C, Annexed to Foregoing Complaint.

June 11, 1930	Total stock held	12250 shares
	Death value thereof at \$72.75	\$ 891,187.50
	Death value of stock originally acquired prior to Sept. 8, 1916:	
	11079½ shares at \$72.75	806,033.63
	Death value of stock acquired subsequent to Feb. 26, 1926 by the exercise of rights and the payment of cash:	
	1170½ shares at \$72.75	85,153.81
**	Stock actually exchanged on May 23, 1923	

Item 13—Standard Oil Company of New York

77	May 29, 1914	Purchased (\$100 par)	100 shares
	Aug. 13, 1914	" " "	50 "
	Aug. 14, 1914	" " "	50 "
	Aug. 17, 1914	" " "	50 "
	Aug. 18, 1914	" " "	50 "
	Aug. 28, 1914	" " "	25 "
	Nov. 9, 1914	" " "	50 "
	Feb. 8, 1915	Transferred from individual a/c H. C. Folger	1 "
			<hr/>
			376 "
	Mar. 27, 1915	Sold (\$100. par)	30 shs.
	Mar. 29, 1915	" " "	20 "
3	Mar. 31, 1915	" " "	50 "
	Apr. 9, 1915	" " "	50 "
	Apr. 17, 1915	" " "	20 "
	Apr. 19, 1915	" " "	30 "
	Nov. 4, 1918	" " "	125 "
			<hr/>
	Total sales		325 shares
			<hr/>
	Balance		51 shares
	Aug. 26, 1915	Purchased (\$100 par)	100 shares
	Feb. 9, 1916	Transferred from individual a/c Mrs. Emily C. J. Folger	250 "
	Feb. 14, 1916	Transferred from individual a/c H. C. Folger	50 "
	Feb. 18, 1916	Purchased	100 "
			<hr/>

Exhibit C, Annexed to Foregoing Complaint.

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Total original acquisitions		551 shares	
(of which:			
Mrs. Emily C. J. Folger contributed 250 shs. or		45.37%	
H. C. Folger contributed 51 shares or		9.26%	
Contribution unascertainable 250 shs. or		45.37%)	
Balance as above		551 shares	
Dec. 2, 1922	Par reduced to \$25 and stock exchanged 4 for 1		
** Received in lieu of stock held		2204	"
Dec. 2, 1922	Stock dividend 200% (\$25 par)	4408	"
Feb. 1, 1926	Stock dividend 25% (\$25 par)	1653	"
		<hr/>	
June 11, 1930	Total stock held	8265	" 80
Death value of stock originally acquired prior to Sept. 8, 1916:			
8265 shares at 33 13/16		\$ 279,460.31	
Contributed by			
Emily C. J. Folger, the survivor, 45.37%			
or		126,791.14	
H. C. Folger, the decedent 9.26% or		25,878.03	
Contribution unascertainable 45.37% or ..		126,791.14	
** Certificates actually exchanged on Novem- ber 24, 1925			
 <i>Item 14—Swan Finch Oil Corporation—Common Stock</i>			
Apr. 30, 1920	Purchased \$100 par	1 share	81
Oct. 22, 1924	Par reduced to \$25 and stock exchanged 4 for 1		
** Received in lieu of stock held		4	"
		<hr/>	
June 11, 1930	Total stock held	4	"
Value of stock originally acquired in 1930			
4 shares at \$9.		\$ 36.00	
** Certificates actually issued on Oct. 22, 1924 and Nov. 17, 1924			
 <i>Item 15—Swan Finch Oil Corporation—7% Preferred Stock</i>			
Sept. 3, 1929	*Purchased (\$25 par)	1 share	
June 11, 1930	Total shares held	1	"
Value of stock acquired subsequent to Feb. 26, 1926 by the exercise of rights and the payment of cash			
		\$ 20.00	

82

Exhibit C, Annexed to Foregoing Complaint.

* Purchased by exercise of right to subscribe (1 right for each Capital share held and \$25.)

Item 16—(a) *Standard Oil Company (California)*
and

(b) *Standard Oil Company of California*

		(a) <i>Standard Oil Company (California)</i>	
	July 16, 1914	Purchased (\$100 par)	50 shares
	Feb. 9, 1915	Transferred from individual a/c H. C. Folger	1 1/2 "
83	Feb. 9, 1915	Transferred from individual a/c Emily C. J. Folger	1 1/2 "
	Feb. 24, 1915	Transferred from individual a/c H. C. Folger	639 "
	Feb. 24, 1915	Transferred from individual a/c Emily C. J. Folger	656 "
	Feb. 29, 1915	Purchased	50 "
		Total original acquisitions	1397 "
	(of which		
	Mrs. Emily C. J. Folger contributed	656 1/2 shs. or	46.99%
	H. C. Folger contributed	640 1/2 shs. or	45.85%
	Contribution unascertainable	100 shs. or	7.16%
	Balance as above		1397 shares
84	April 19, 1916	stock dividend 50%	698 1/2 "
	April 16, 1917	" " 33 1/3%	698 1/2 "
	July 26, 1918	sold (\$100 par)	2794 "
	July 29, 1918	sold " "	10 shs.
	Aug. 1, 1918	" " "	20 "
			70 " 100 shares
	Mar. 10, 1921	Par reduced to \$25 and stock exchanged 4 for 1	2694 "
	** Received in lieu of stock held		10776 "
	Dec. 30, 1922	Stock dividend 100% (\$25 par)	10776 "
			21552

Exhibit C, Annexed to Foregoing Complaint.

85

Apr. 25, 1923 Subscribed to 2694 shares (\$25 par) by exercise of stock rights issued Mar. 26, 1923, at ratio 1 to 8 and payment of \$25 cash
 Rights quoted at \$3.75 ea.
 Stock quoted at \$55.50
 21552 rights @ \$3.75 \$ 80,820.00
 Cash 2694 @ \$25 67,350.00

Total cost 2694 shares 148,170.00
 Stock purchased by rights 54.55% 1470 shares
 Stock purchased by cash 45.45% 1224 "

86

Total stock held 24246 "
 Original acquisition:
 Prior to Sept. 8, 1916 23022 shs.
 Subsequent to Sept. 8, 1916 and prior to June 2, 1924 1224 shs.

(b) Standard Oil Company of California
 May 29, 1926 The Standard Oil Company (California) was dissolved as a California corporation and the Standard Oil Company of California was incorporated in Delaware. The stock of the new company was exchanged for the stock of the old company share for share.

Received in lieu of stock held above 24246 shs.

87

Dec. 16, 1929 Stock dividend (460 shares on stock acquired prior to Sept. 8, 1916, and 24 on stock acquired thereafter) 484 "

June 11, 1930 Total stock held 24730 "
 Death value of stock 24730 shares @ 65 $\frac{1}{4}$ \$1,613,632.50
 Death value of stock originally acquired prior to Sept. 8, 1916:
 23482 shares @ 65 $\frac{1}{4}$ 1,532,200.50
 Contributed by
 Emily C. J. Folger, the survivor 46.99%
 or \$ 719,981.01
 H. C. Folger, the decedent 45.85% or .. \$ 702,513.93
 Contribution unascertainable 7.16% or \$ 109,705.56

88

Exhibit C, Annexed to Foregoing Complaint.

Death value of stock acquired subsequent
to Sept. 8, 1916 and prior to June 2,
1924 by the exercise of rights and the
payment of cash:

1248 shares @ 65¼	\$	81,4
Contribution unascertainable 100% or ...	\$	81,4

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

89

EMILY C. J. FOLGER, being duly sworn, deposes and says: that she is the plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge except as to those matters which are stated to be alleged upon information and belief and as to those matters she believes it to be true.

EMILY C. J. FOLGER

Sworn to before me this
27th day of August, 1935.

OWEN F. SMITH

Notary Public, Nassau County No. 1536
Certificate filed in New York County
Clerk's No. 645, Register's No. 78375
Commission Expires March 30, 1937

90

SEAL

Answer as Amended by Order dated February 17, 1938, and by Stipulation, dated October 30, 1936. 91

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York,
Defendant.

L-6839

92

The defendant, Walter C. Corwin, by his attorney, Leo J. Hickey, United States Attorney for the Eastern District of New York, answering the complaint of the plaintiff herein, and for his Amended Answer, states and alleges:

93

I. Admits the allegations contained in paragraphs marked "First," "Second," "Third," "Fourth," "Fifth," "Sixth" and "Seventh" of the complaint.

II. Admits that the sum of \$79,791.63 was included as part of the gross and net estates of said Henry C. Folger, as stated in paragraph marked "Eighth" of the complaint, but denies that the said sum was improperly included therein.

94 *Answer as Amended by Order, dated February 17, 1938, etc.*

III. Denies each and every allegation contained in paragraph marked "Ninth" of the complaint.

IV. Admits each and every allegation contained in paragraph marked "Tenth" of the complaint.

V. Denies each and every allegation contained in paragraphs marked "Eleventh" and "Twelfth" of the complaint.

95 VI. Denies each and every allegation contained in paragraph marked "Thirteenth" of the complaint, except that it admits that the full sum of \$3,773,881.06 was included as part of the gross and net estates of the decedent.

VII. Admits each and every allegation contained in paragraphs marked "Fourteenth" and "Fifteenth" of the complaint.

96 VIII. Denies each and every allegation contained in paragraphs marked "Sixteenth," "Seventeenth" and "Eighteenth" of the complaint.

IX. Admits the allegations contained in paragraph marked "Nineteenth" of the complaint, except that the return referred to therein was filed on June 10, 1931.

X. Admits each and every allegation contained in paragraph marked "Twentieth" of the complaint, except that the tax referred to therein was paid June 10, 1931.

XI. Admits each and every allegation contained in paragraphs marked "Twenty-first," "Twenty-

Answer as Amended by Order, dated February 17, 1938, etc. 97

second," "Twenty-third," "Twenty-fourth" and "Twenty-fifth" of the complaint.

XII. Denies each and every allegation contained in paragraph marked "Twenty-sixth" of the complaint, except that he admits that the tax and interest referred to therein was paid on the date stated therein.

XIII. Admits each and every allegation contained in paragraph marked "Twenty-seventh" of the complaint. 98

XIV. Denies each and every allegation contained in paragraph marked "Twenty-eighth" of the complaint.

XV. The allegations contained in paragraphs "Twenty-ninth" and "Thirtieth" of the complaint are hereby admitted.

FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE TO THE PLAINTIFF'S CAUSE OF ACTION, THE DEFENDANT ALLEGES: 99

XVI. That the sum of \$57,419.15, sought to be recovered by the plaintiff, was collected by the defendant in his official character as a Collector of Internal Revenue, pursuant to an additional assessment of estate tax against the estate of the decedent, which was duly made by the Commissioner of Internal Revenue and certified to the defendant for collection from said estate; that said sum was duly remitted and paid by the de-

100 *Answer as Amended by Order, dated February
17, 1938, etc.*

101 fendant into the Treasury of the United States as a collection of internal revenue; that no part of the same was collected or exacted by the defendant excessively, illegally, or without authority of law; that no part of same has ever been returned by the United States Treasury to the defendant for the use and benefit of the plaintiff, and that defendant is not indebted to the plaintiff in said sum or any part thereof or for any interest thereon.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE
TO THE PLAINTIFF'S CAUSE OF ACTION, DEFEND-
ANT ALLEGES:

102 XVII. Henry C. Folger died June 11, 1930, and on June 10, 1931, plaintiff filed with the Collector of Internal Revenue a federal estate tax return reporting a gross estate of \$15,602,729.24, deductions of \$12,788,584.72, which resulted in a net estate of \$2,814,144.52.

XVIII. Thereafter the Commissioner of Internal Revenue made an audit and review of said estate tax return and fixed the total value of the decedent's statutory gross estate at \$15,359,827.69, allowed deductions of \$10,468,180.70 and determined a net estate of \$4,891,646.99. The Commissioner allowed a total deduction on account of decedent's bequests to charity of \$6,396,898.00.

XIX. By the elimination from the decedent's gross estate amounting to \$15,359,827.69, of the sum of the jointly owned stock held by the deced-

Answer as Amended by Order, dated February 17, 1938, etc. 103

ent and Emily C. J. Folger, his wife, amounting to \$3,792,744.44, the balance is \$11,567,083.25. Deducting debts of the estate in the amount of \$3,971,282.61, the net value of the estate, in accordance with the valuation of the Commissioner of Internal Revenue is \$7,595,800.64, and one-half of the net value is \$3,797,900.32.

XX. Section 17 of the decedent's estate law of the State of New York provides that "No person having a husband, wife, child or parent shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association, corporation or purpose, in trust or otherwise, more than one-half part of his or her estate, for the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more." 104

XXI. The total net value of the decedent's estate, less his debts, is \$7,793,422.20, and one-half of this amount is \$3,896,711.10. The Commissioner of Internal Revenue allowed a deduction on account of bequests to charity in the amount of \$6,396,898.09, which is in excess of one-half of the net value of the decedent's estate by the amount of \$2,500,186.99, which sum is greatly in excess of the amount that plaintiff claims in this action was erroneously included by the Commissioner of Internal Revenue in the decedent's gross and net estates. 105

XXII. The allowance by the Commissioner of Internal Revenue of a deduction on account of

106 *Ansicer as Amended by Order, dated February
17, 1938, etc.*

charitable bequests in an amount in excess of one-half of the decedent's net estate was erroneous, illegal and void, and, therefore, in any event, by reason of the fact that such erroneous deduction is in excess of the amount plaintiff claims was erroneously included in decedent's gross and net estates and of the provisions of Section 17 of the decedent's estate law of the State of New York. plaintiff is not entitled to any recovery in this
107 action.

WHEREFORE, defendant demands judgment dismissing the complaint of the plaintiff herein, together with costs.

LEO J. HICKEY,
United States Attorney,
Eastern District of New York,
Attorney for Defendant,
519 Federal Building,
Borough of Brooklyn,
City of New York.

108

Answer as Amended by Order, dated February 17, 1938, etc. 109

State of New York,
Eastern District of New York, } ss.:

JOHN G. DALTON, being duly sworn, deposes and says, that he is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law.

Deponent further states that he has read the foregoing amended answer, and the same is true to his own knowledge and belief, except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 110

Deponent further states that the reason this verification is made by deponent instead of by defendant is that the defendant is a sovereign power.

Deponent further states that the sources of his information and the grounds of his belief are correspondence and papers on file in the office of the United States Attorney, Brooklyn, New York, and information obtained in his official capacity as Assistant United States Attorney. 111

JOHN G. DALTON.

Sworn to before me this
2nd day of May, 1936.

FRANK J. PARKER,

Notary Public.

Kings Co. No. 47.

Commission Expires March 30, 1938.

112

Bill of Exceptions.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

113

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

114

BE IT REMEMBERED that at a stated term of the
District Court of the United States for the East-
ern District of New York, on November 17, 1936,
before the Honorable Mortimer W. Byers, United
States District Judge for the Eastern District of
New York presiding, the following proceedings
were had:

APPEARANCES:

MESSRS. HAWKINS, DELAFIELD & LONGFELLOW, At-
torneys for Plaintiff, C. O. Donahue, Esq., of
Counsel.

LEO J. HICKEY, Esq., United States Attorney for
Defendant, Clarence E. Dawson, Esq., Special
Assistant to Attorney General, John J. Dal-
ton, Esq., Assistant United States Attorney,
of Counsel.

Bill of Exceptions.

115

Mr. Donahue: We have certain stipulations. The first stipulation is one waiving a jury.

(Marked Plaintiff's Exhibit 1.)

Mr. Donahue: Then I have marked copies of the pleadings, which contain certain admissions. (Considered in evidence but not marked.)

Mr. Donahue: Then I have the stipulation of facts.

116

(Marked Plaintiff's Exhibit 2.)

Mr. Donahue: Then I offer certain ledger sheets of the Standard Oil Company and other corporations showing the existence of the joint accounts. I would like to offer all these sheets as one exhibit.

(Ledger sheets marked Plaintiff's Exhibit 3.)

Mr. Donahue: These are stock certificates of the Standard Oil Company of New York.

117

(Marked Plaintiff's Exhibit 4.)

Mr. Donahue: I also offer certain stock certificates of the Standard Oil Company of California.

(Marked Plaintiff's Exhibit 5.)

Mr. Donahue: I offer a transcript of journal entries of the Standard Oil Company of California, showing transfer of certain shares to the joint account.

(Marked Plaintiff's Exhibit 6.)

118

Bill of Exceptions.

Mr. Donahue: I offer photostatic copy of journal entries of the Standard Oil Company of California, relating to the joint account.

(Marked Plaintiff's Exhibit 7.)

Mr. Donahue: I also offer a transcript of the journal entries of the Standard Oil Company of New York, showing transfers from Mrs. Folger to the joint account.

119

(Marked Plaintiff's Exhibit 8.)

Mr. Donahue: And I offer certified copy of Mr. Folger's will.

(Marked Plaintiff's Exhibit 9.)

Mr. Donahue: The only additional fact, your Honor, is that the United States Attorney has consented to stipulate on the record that the tax was paid under protest.

120

Now, I have one witness, your Honor.

EDWARD JORDAN DIMOCK, the plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. Donahue:

Q. Mr. Dimock, as executor of Emily C. J. Folger, deceased, and substituted executor of the will of Henry C. Folger, you are the plaintiff in this action? A. That is right.

Bill of Exceptions.

121

Q. And you are an attorney at law and a member of the firm of Hawkins, Delafield & Longfellow, who are the attorneys for the plaintiff in this action? A. That is right.

Q. Were you related to either Mr. or Mrs. Folger? A. Yes; I was Mrs. Folger's nephew.

Q. Can you state where Mr. and Mrs. Folger resided in the years 1912, 1913, and 1914? A. Yes. At that time they resided at 24 Brevort Place, Brooklyn.

Q. How long did they reside there? A. They 122
had resided either in that house or in a house in the neighborhood on Lefferts Place since prior to 1900.

Q. Did you see Mr. and Mrs. Folger occasionally during the time from 1900 to 1914? A. Yes; they often visited my house and I visited their house.

Q. Did they continue to live at Brevort Place until shortly before Mr. Folger's death? A. Yes; until a year before Mr. Folger's death they resided there. After that they moved to Glen Cove.

Q. From 1914 to the date of Mr. Folger's death did they have any residence outside of New York 123
City? A. They did not.

Q. Was Mr. Folger a member of the bar of the State of New York? A. He was.

The Court: Do I understand the residence was changed in about 1929 to Glen Cove? Is that it?

The Witness: That's right, your Honor.
Mr. Donahue: In Nassau County.

The Court: Yes.

Mr. Donahue: That is all.

Mr. Dalton: No cross examination. No testimony offered on the part of the Government.

124 **Plaintiff's Exhibit 1—Stipulation Waiving Jury.**

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

125	<p>EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;"><i>against</i></p> <p>WALTER C. CORWIN, late Collector of Internal Revenue, First District of New York,</p> <p style="text-align: right;">Defendant.</p>	} L-6839
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126 IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, that this action and the issues therein may be tried and determined by the Court without the intervention of a jury, and a jury is hereby waived.

Dated, New York, November 17, 1936.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

LEO J. HICKEY,
United States Attorney.

JOHN G. DALTON,
Assistant United States Attorney,
Attorney for Defendant.

Plaintiff's Exhibit 2—Stipulation of Facts.

127

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

v.

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

128

IT IS HEREBY STIPULATED AND AGREED, by and be-
tween the parties hereto, by their respective at-
torneys, that the following facts are to be taken
as true, provided however, that each party re-
serves and has the right to introduce other and
further evidence not inconsistent with the facts
stipulated herein.

129

I

That at the time of the death of Henry C.
Folger, he and Emily C. J. Folger were the joint
owners of shares of stock held in joint accounts in
certain corporations which were registered on the

130 *Plaintiff's Exhibit 2—Stipulation of Facts.*

books of the corporations issuing the same. The names of the corporations whose stock was so owned, the market value at the date of the decedent's death, and the number of shares of each kind of stock, the names in which the shares were registered and the forms of the registrations are correctly stated and set forth in Exhibit "B" annexed to the complaint herein, verified August 27, 1935.

131

II

That Exhibit "C" annexed to the complaint herein correctly sets forth the dates of original registration of such shares in said names and forms, the names of the persons transferring the shares to the joint account, where ascertainable, the dates and amounts of subsequent increases thereof by stock dividends, the exercise of rights to subscribe, and stock split-ups by reduction of the par value, the amounts of cash paid in such exercise of rights to subscribe, and the then market values of the shares and rights at the time of such exercise.

132

III

That on or about February 9, 1916, Emily C. J. Folger transferred from her individual account to a joint account entitled "Henry C. Folger and Emily C. J. Folger, or the survivor," 250 of the said 251 shares of the capital stock of the Standard Oil Company of New York, as is shown by item 13 of said Exhibit "C" annexed to the complaint, which shares or their derivatives, as appears from said Exhibit "C," had a market value

Plaintiff's Exhibit 2—Stipulation of Facts.

133

of \$126,791.14 at the date of the death of the decedent Henry C. Folger. Said 250 shares of the capital stock of the Standard Oil Company of New York were given to said Emily C. J. Folger by the decedent, Henry C. Folger on or about May 29, 1912 and were registered in her name on or about that date.

That on or about the dates hereinafter set forth Emily C. J. Folger transferred from her individual account to a joint account entitled "H. C. Folger and Emily C. J. Folger or the survivor" 656½ 134 shares of the capital stock of the Standard Oil Company (California), as follows:

On or about February 9th, 1915.. ½ share

On or about February 24th, 1916 656 shares

which shares, as shown in item 16 of Exhibit "C" annexed to the complaint, or the derivatives thereof, as appears from said Exhibit "C," had a market value of \$719,981.01 at the date of the death of the decedent, Henry C. Folger. Said 656½ shares of the capital stock of the Standard Oil Company (California) were given to said Emily C. J. Folger by the decedent, Henry C. Folger, between November 17, 1913 and March 10, 1914 and were registered in her name on or about the dates on which they were given to her. 135

V

That the denial contained in Paragraph "XV" of the defendant's answer, verified May 2, 1936, reading as follows:

136 *Plaintiff's Exhibit 2—Stipulation of Facts.*

"XV. Denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph marked 'Twenty-ninth' and 'Thirtieth' of the complaint."

be and the same is hereby withdrawn, and the allegations contained in Paragraphs "Twenty-ninth" and "Thirtieth" of the complaint are hereby admitted.

137

VI

That the plaintiff, in lieu of producing the original stock certificates, stock ledgers and stock journals of the various companies set forth in Exhibits "B" and "C," may offer in evidence, without objection by the defendant, transcripts or photostats of such stock certificates, stock ledger and stock journal entries of said companies (which entries are hereby admitted to be made in the regular course of business) and said transcripts or photostats need not be identified by any witness, but shall be identified by reference to the initials of the attorneys for the parties hereto endorsed on the back thereof.

138

VII

That all of the stock in the joint accounts in the name of "Henry C. Folger and Emily C. J. Folger, or the survivor" was either

(1) Stock which was the property of Henry C. Folger and originally registered in his name and which was transferred by him to the joint account; or

Plaintiff's Exhibit 2—Stipulation of Facts.

139

(2) Stock purchased by Henry C. Folger and registered in the names of "Henry C. Folger and Emily C. J. Folger, or the survivor" in the first instance; or

(3) Stock purchased by Henry C. Folger and given by him to Emily C. J. Folger, and registered in her name, and subsequently transferred to the joint account by her (the stock referred to in paragraphs III and IV of this stipulation is the only stock of this class); or

140

(4) The proceeds of stock dividends, the exercise of rights, and increases by split-ups which were derived from stock of the preceding three classes.

No consideration in money or money's worth was paid to the decedent Henry C. Folger for said stocks by Emily C. J. Folger.

Schedule C annexed to the complaint shows to which class the stock in the joint account belonged.

141

VIII

That the plaintiff filed with the Collector of Internal Revenue an estate tax return reporting a gross estate of \$15,602,729.24, deductions of \$12,788,584.72, resulting in a net estate of \$2,814,144.52; that the Commissioner of Internal Revenue fixed the total value of decedent's gross estate at \$15,359,827.69, allowed deductions of \$10,468,180.70 and determined a net estate of \$4,891,646.99; that the said Commissioner allowed a total deduction on account of decedent's bequests to charity of \$6,396,898.00.

142 *Plaintiff's Exhibit 2—Stipulation of Facts.*

IX

Paragraph XIX of defendant's amended answer verified the 2nd day of May, 1936, is hereby amended to read as follows, and as so amended is admitted by plaintiff.

143

"XIX. By the elimination from the decedent's gross estate amounting to \$15,359,827.69 of the sum of the jointly owned stock held by the decedent and Emily C. J. Folger, his wife, amounting to \$3,792,744.44, the balance is \$11,567,083.25. Deducting debts of the estate in the amount of \$3,971,282.61, the net value of the estate in accordance with the valuation of the Commissioner of Internal Revenue is \$7,595,800.64, and one-half of the net value is \$3,797,900.32."

Dated, October 30, 1936.

144

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

LEO J. HICKEY,
United States Attorney.

JOHN G. DALTON,
Assistant U. S. Attorney,
Attorney for Defendant.

Further Stipulation of Facts.

145

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

146

WHEREAS, the parties hereto have executed a
stipulation of facts dated October 30, 1936 and de-
sire to supplement said stipulation with additional
facts

147

NOW, THEREFORE

IT IS HEREBY STIPULATED AND AGREED as follows:

(1) That after the death of Henry C. Folger
all persons who under the intestate laws of the
State of New York would be entitled to a share
of his estate executed certain written waivers;

(2) That certified copies of the said waivers ex-
ecuted by said persons, namely, Edward P. Folger,
Stephen Lane Folger, Emily C. J. Folger and
Mary Folger Wells be submitted in evidence and
become a part of the record herein as Defendant's

148

Further Stipulation of Facts.

Exhibit A collectively with the same force and effect as though the said waivers had been offered in evidence at the trial herein and said certified copies of said waivers shall be deemed to be included in and be a part of the record herein as Defendant's Exhibit A;

149 (3) That the decedent made bequests to charity of a value at the date of his death of \$6,396,898.00; that such bequests were paid by the executrix or will be paid by the substituted executor to a corporation organized and operated exclusively for charitable purposes as defined by Section 303, subdivision (a) (3) of the Revenue Act of 1926;

150 (4) That this stipulation shall be deemed part of and a supplement to the stipulation of facts dated October 30, 1936, which was submitted at the trial herein and marked "Plaintiff's Exhibit 2," and shall be deemed to be included in and be a part of the record herein as part of Plaintiff's Exhibit 2 with the same force and effect as though the provisions hereof had been incorporated in the said stipulation of facts dated October 30, 1936, and that this case and the trial thereof be opened for the sole purposes of making effective the provisions hereof.

Dated, New York, New York, February 5, 1937.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

LEO J. HICKEY,
United States Attorney,
Attorney for Defendant.

By JOHN G. DALTON,
Assistant U. S. Attorney.

So Ordered:
Feb. 6, 1937.

M. W. B.,
U. S. D. J.

Plaintiff's Exhibit 9—Will of Henry C. Folger. 151

I, HENRY C. FOLGER, of Brooklyn, New York, do make, publish and declare this to be my last Will and testament.

FIRST: I give and bequeath the sum of Fifty Thousand Dollars (\$50,000.), in securities or cash, to my sister, Mary Folger Wells, and a like sum to each of my two brothers, Stephen L. Folger and Edward P. Folger.

SECOND: I give and bequeath the sum of Twenty-Five Thousand Dollars (\$25,000.), in securities or cash, to my nephew, Henry C. Folger, 3rd., and a like sum to each of my five nieces, Lida Wells Cleaveland, Elizabeth Wells Geissman, Mary Wells Smith, Dorothy Folger Straley, and Eleanor Folger. 152

THIRD: I nominate and appoint my wife, Emily C. J. Folger, as Executrix of this my last Will and testament, and, provided she shall so desire, I hereby give her power to designate my brother, Stephen Lane Folger, or her nephew, Edward Jordan Dimock, as joint executor with her. In case my said wife shall not qualify as such executrix, I nominate and appoint my brother, Stephen Lane Folger, sole Executor of this my last Will and testament; and in case neither my said wife nor my said brother shall qualify, I nominate and appoint Edward Jordan Dimock sole Executor. 153

I hereby direct that none of the persons above named shall be required to give any bond or security for the proper discharge of his duty.

In case none of the persons above named shall qualify, I nominate and appoint the Seaboard National Bank, of the City of New York, as Executor.

154 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

FOURTH: In case my said brother shall qualify and act as Executor of this Will, I give and bequeath to him the additional sum of Fifty Thousand Dollars (\$50,000.) in lieu of all executor's fees and commissions; and in case said Edward Jordan Dimock shall qualify as such executor, I give and bequeath to him the sum of Fifty Thousand Dollars (\$50,000.) in lieu of all executor's fees and commissions.

155 FIFTH: All the rest, residue and remainder of my property, both real and personal, I give, devise and bequeath to the Trustees of Amherst College and to their successors in said office as Trustees of said College, to have and to hold, IN TRUST, however, for the uses and purposes and subject to the conditions hereinafter specified and not otherwise, to wit:

156 (a) That within three years from the date of my death said Trustees shall install and establish my Shakespeare collection, consisting of books, pamphlets, documents, manuscripts, pictures, art objects, and other items relating to Shakespeare, as a permanent library in a building in the city of Washington, D. C., said library and building to be known as the "Folger Shakespeare Memorial", and shall thereafter maintain said library, and all additions thereto, as a separate and distinct library under said name, in said city, for the promotion and diffusion of knowledge in regard to the history and writings of Shakespeare, and shall keep the said library open to all students of Shakespeare under such reasonable regulations as said Trustees may from time to time adopt; and,

Plaintiff's Exhibit 9—Will of Henry C. Folger. 157

(b) If prior to my death I shall have acquired or made arrangements to acquire a lot in said city for the erection of said building, said Trustees shall retain said lot or complete the arrangements for the acquisition thereof; and should I have had plans prepared and the construction of said building begun, said Trustees shall proceed immediately, and within three years from the date of my death complete the erection of said building on said lot; otherwise said Trustees shall within three years from the date of my death acquire a suitable lot in said city of Washington and erect thereon a suitable fireproof building for the housing of said library and for the convenient use and exhibition of the same; and for the acquiring of said lot and the completion of the library building as hereinbefore stated, said Trustees my use and expend the income, and so much of the principal, of my estate, other than said Shakespeare collection, as may be necessary for said purposes; and 158

(c) Within the said period of three years from the date of my death said Trustees shall set aside all the rest, residue and remainder of the property hereby bequeathed and devised to them in trust (except the said library collection and the amount expended in the acquisition of said lot and the construction of said building), and with the same shall establish a fund to be known as the "Folger Shakespeare Memorial Fund", and shall keep said fund intact, except as hereinafter specified, and keep the same invested in good and safe income-bearing securities, with power to sell or dispose of any of the property or secu- 159

160 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

rities in said fund and reinvest the proceeds thereof and to change investments from time to time and to manage and control said fund and receive the income thereof and to use the income from said fund as hereinafter directed and not otherwise; and

161 (d) Said Trustees, as entire compensation for their services in administering the trust herein created, shall take out of the income from said fund and pay over or use for the benefit of said Amherst College one-fourth of the annual net income thereof until such one-fourth of the annual net income equals Two Hundred and Fifty Thousand Dollars (\$250,000), but shall take and use for said purpose not less than One Hundred Thousand Dollars (\$100,000.) per year; that is, the minimum amount which is to be taken, paid over and used for the benefit of Amherst College, out of the annual income, is to be not less than One Hundred Thousand Dollars (\$100,000.) per year nor more than Two Hundred and Fifty Thousand Dollars (\$250,000.) per year; and

162

(e) Said Trustees shall next, out of the remainder of said annual income from said fund, pay to my wife, Emily C. J. Folger, Fifty Thousand Dollars (\$50,000.) per year during her natural life, payable in quarterly instalments; and

(f) Said Trustees shall next, out of the remainder of said annual income, pay Five Thousand Dollars (\$5,000.) per year to each of my said two brothers and one sister, and to each of Mrs. Folger's one brother and two

Plaintiff's Exhibit 9—Will of Henry C. Folger. 163

sisters, during the life of each, to be paid quarterly; and Two Thousand Dollars (\$2,000.) per year, to be paid quarterly, to each of my five nieces and one nephew and to each of Mrs. Folger's two nieces and two nephews during the life of each; and

(g) All the balance of the income from said fund shall be used by said Trustees for the maintenance, upkeep and enlargement of said library and for the necessary administration expenses and for additions to the collection 164 in keeping with its original character, and for the upkeep and additions to said building and its equipment, and for other purposes consistent with the foregoing, which tend to increase the usefulness of the library as an institution for promoting and diffusing knowledge of the writings and history of Shakespeare; and

(h) The principal of said "Folger Shakespeare Memorial Fund" shall be kept intact, provided that to the extent that it may at any time exceed Ten Million Dollars (\$10,000,000.) 165 it may be used for acquiring additions to the library and its development, and if for any reason the value of the properties in said fund should be at any time less than Ten Million Dollars (\$10,000,000.), sufficient of the income shall be used as soon as practicable to restore said fund so that it shall be always of the value of at least Ten Million Dollars (\$10,000,000).

SIXTH: In case the said Trustees of Amherst College, or their successors, shall fail or refuse to accept the trust herein created, or shall fail to

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166 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

comply with any of the several clauses or any of the conditions or provisions of the foregoing FIFTH paragraph hereof, or if said Amherst College and said Board of Trustees should cease to exist, then and in that event the bequests and devises herein made to said Trustees shall be revoked, forfeited and terminated and the property bequeathed and devised and held by them hereunder shall be assigned, transferred and vest in the Trustees of the University of Chicago, and their successors as such Trustees, who shall thereupon hold same under the same trusts, conditions and provisions as if they had been originally designated herein as Trustees of said property, except that in such case any of the income herein provided to be taken out, paid or used for the benefit of Amherst College shall be taken out, paid or used for the benefit of said University of Chicago; and if said Trustees of the University of Chicago, or their successors, shall fail or refuse to accept the trust herein created, or shall fail to comply with any of the several clauses or any of the conditions or provisions of the foregoing FIFTH paragraph hereof, or if said University of Chicago and said Board of Trustees should cease to exist, then and in that event the bequests and devises herein made to said Trustees shall be revoked, forfeited and terminated and the property bequeathed and devised and held by them hereunder shall be assigned and transferred and vest in the Library of Congress Trust Fund Board with the same powers and subject to the same conditions as if they had originally been named herein as Trustees, and upon the further condition that they keep the said Library intact in a separate library building, as a distinct and separate part of the Congressional Library under the name of "Folger

Plaintiff's Exhibit 9—Will of Henry C. Folger. 169

Shakespeare Memorial", and that the income herein bequeathed for the use of said Colleges, or either of them, shall be used as the residue of the income for the upkeep and additions to said Library.

SEVENTH: My wife, Emily C. J. Folger, has from the beginning aided me greatly with her advice and counsel, and has shared in developing my plan for a Shakespeare Memorial Library, and has assisted me in the selection and care of my collection. I therefore request that the Trustees under said Will permit my said wife to borrow books and other items from said collection freely and without restriction, and that they consult her in the case of all plans of the said library and all regulations and expenditures pertaining to the same, other than routine disbursements; this request is not obligatory nor binding upon the said Trustees, and I hereby provide and declare that their compliance with the same shall not in any manner constitute a violation of any of the conditions contained in the several clauses of Paragraph FIFTH hereof. 170 171

EIGHTH: All persons who under the intestate laws of the State of New York would be entitled to a share of my estate should I have died intestate, desiring to aid in the establishment of said "Folger Shakespeare Memorial" library, and in consideration of the grants and bequests herein made to them, have consented to this Will and waived in writing all of their rights to object thereto or to protest against it for any cause. If objection or protest be made to the probate of this Will, or to the carrying out of its provisions, and

172 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

if the courts having jurisdiction of my estate should finally decide that the grant herein made to said Trustees is for a greater part of my estate than can be legally devised and bequeathed to them for the purposes and uses stated, then I direct that said devise and bequest to said Trustees shall in any case remain in force and include said Shakespeare library and collection and so much more of my estate as may legally be devised and bequeathed for the purposes stated, said library and said portion of my estate to be held by
 173 said Trustees for the purposes and uses and subject to the conditions hereinbefore stated in Paragraph FIFTH hereof, and all the rest and remainder of my estate not otherwise specifically bequeathed and not included in the devises and bequests which said Trustees shall be allowed to retain and have, I give, devise and bequeath to my said wife, Emily C. J. Folger, absolutely. It is my wish, but I do not so direct, that in such case she shall give and grant or bequeath such estate, or such portion thereof as she may deem best, for the use and maintenance of said Folger Shakespeare Memorial.
 174

NINTH: Should any of the beneficiaries named in this Will object to the probate thereof, or in any wise, directly or indirectly, obstruct, contest, or aid in contesting the same, or any of the provisions thereof, or the distribution of my estate thereunder, then and in that event I annul my bequests herein made to such beneficiaries, and it is my will that such beneficiary shall be absolutely barred and cut off from any share in my estate.

Plaintiff's Exhibit 9—Will of Henry C. Folger. 175

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of March, One Thousand Nine Hundred and Twenty-Seven.

HENRY C. FOLGER (L. S.)

Signed, sealed, published and declared by Henry C. Folger, the testator above named, as and for his last Will and Testament, in our presence and we, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses. 176

A. G. WELSH residing at 18 Lakeside Drive
Baldwin, N. Y.

WILLIAM J HIGGS residing at Maplewood N J,
ARTHUR T ROBERTS residing at Bronxville N. Y.

178 *Plaintiff's Exhibit 9—Will of Henry C. Folger.*

STATE OF NEW YORK, }
 COUNTY OF NASSAU, } ss.:
 SURROGATE'S COURT, }

179 Recorded in the office of the Surrogate of Nassau County, in Liber 43 of Wills of Real Estate, page 1 the foregoing last Will and Testament of HENRY C. FOLGER, deceased, as a will of real and personal estate, and the decree admitting the same to probate in the Surrogate's Court in the said County of Nassau, which record is signed and hereby certified by me pursuant to the provisions of the statutes of the State of New York.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the said Surrogate's Court, at the Surrogate's office aforesaid, this 25th day of June, 1930.

EDWIN W. WEEKS,
 Clerk of the Surrogate's Court.

[SEAL]

Plaintiff's Exhibit 9—Will of Henry C. Folger. 181

STATE OF NEW YORK, }
COUNTY OF NASSAU, } ss.:
SURROGATE'S COURT, }

I, EDWIN W. WEEKS, Clerk of the Surrogate's Court of the County of Nassau, do certify that I have compared the preceding with the original record of the last Will and Testament of HENRY C. FOLGER, deceased, as the same was proved in the Surrogate's Court of said County, on the 25th day of June, 1930, and is recorded in said office in the Book of Wills of Real Estate, Number 43, page 1 and that the same is a correct copy thereof, and of the whole of such original. 182

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Surrogate's Court of the said County of Nassau, at Mineola, in said County this 16th day of July, 1930.

EDWIN W. WEEKS,
Clerk of the Surrogate's Court.

[SEAL]

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184

Defendant's Exhibit A.**SURROGATE'S COURT,****COUNTY OF NASSAU.**

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

185

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

EDWARD P. FOLGER, the undersigned, the brother
of Henry C. Folger, deceased, does hereby appear
in person and waive the issue and service of a
citation in the above entitled matter and consent
that said instrument bearing date March 10, 1927,
be forthwith admitted to probate, and

186

WHEREAS, said Henry C. Folger left him sur-
viving a widow, Emily C. J. Folger, and

WHEREAS, Section 17 of the Decedent Estate
Law of the State of New York provides in sub-
stance that no person having a wife shall, by will,
give to any charitable purpose more than one-half
of his estate and that any such gift shall be valid
to the extent of one-half and no more, and

WHEREAS, said Henry C. Folger left him surviv-
ing his sister, Mary F. Wells, and two brothers,
Stephen L. Folger, and the undersigned, Edward

Defendant's Exhibit A.

187

P. Folger, who, with the widow, would be the only persons who would share in any of his property undisposed of by will,

Now, ~~THEREFORE~~, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, he might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for his sole interest in said property the disposition or dispositions made for him in said Last Will and Testament.

188

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger, and shall be without force or effect unless and until all of said interested persons have made similar waivers.

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Dated, June 19th, 1930.

EDWARD P. FOLGER

Witness:

CHARLOTTE AUBRY
E. J. DIMOCK

STATE OF NEW YORK } ss.:
COUNTY OF NEW YORK }

On this 21st day of June, 1930, before me came E. J. DIMOCK, a subscribing witness to the foregoing instrument, with whom I am personally ac-

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Defendant's Exhibit A.

quainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau County, New York; that he knows Edward P. Folger to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw him execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

191

HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A
Commission expires March 30, 1932

[SEAL]

SURROGATE'S COURT,
COUNTY OF NASSAU.

192

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

STEPHEN L. FOLGER, the undersigned, a brother of Henry C. Folger, deceased, does hereby appear in person and waive the issue and service of a citation in the above entitled matter and consent

Defendant's Exhibit A.

193

that said instrument bearing date March 10, 1927, be forthwith admitted to probate, and

WHEREAS, said Henry C. Folger left him surviving a widow, Emily C. J. Folger, and

WHEREAS, Section 17 of the Decedent Estate Law of the State of New York provides in substance that no person having a wife shall, by will, give to any charitable purpose more than one-half of his estate and that any such gift shall be valid to the extent of one-half and no more, and

194

WHEREAS, said Henry C. Folger left him surviving his sister, Mary F. Wells, and two brothers, Edward P. Folger and the undersigned, Stephen L. Folger, who, with the widow, would be the only persons who would share in any of his property undisposed of by will,

NOW, THEREFORE, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, he might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for his sole interest in said property the disposition or dispositions made for him in said Last Will and Testament.

195

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger,

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Defendant's Exhibit A.

and shall be without force or effect unless and until all of said interested persons have made similar waivers.

Dated, June 20th, 1930.

STEPHEN LANE FOLGER.

Witness:

E. J. DIMOCK

197

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

198

On this 21st day of June, 1930, before me came E. J. DIMOCK, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau County, New York; that he knows Stephen Lane Folger to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw him execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A
Commission expires March 30, 1932

[SEAL]

Defendant's Exhibit A.

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SURROGATE'S COURT,

COUNTY OF NASSAU.

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

200

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

EMILY C. J. FOLGER, the undersigned, the widow
of Henry C. Folger, deceased, does hereby appear
in person and waive the issue and service of a
citation in the above entitled matter and consent
that said instrument bearing date March 10, 1927,
be forthwith admitted to probate, and

WHEREAS, said Henry C. Folger left him sur-
viving a widow, Emily C. J. Folger, and

201

WHEREAS, Section 17 of the Decedent Estate
Law of the State of New York provides in sub-
stance that no person having a wife shall, by will,
give to any charitable purpose more than one-half
of his estate and that any such gift shall be valid
to the extent of one-half and no more, and

WHEREAS, said Henry C. Folger left him surviv-
ing his sister, Mary F. Wells, and two brothers,
Stephen L. Folger and Edward P. Folger, who
with the widow, would be the only persons who
would share in any of his property undisposed of
by will,

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Defendant's Exhibit A.

NOW, THEREFORE, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, she might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for her sole interest in said property the disposition or dispositions made for her in said Last Will and Testament.

203

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger, and shall be without force or effect unless and until all of said interested persons have made similar waivers.

Dated, June 19, 1930.

EMILY C. J. FOLGER.

204 Witness:

E. J. DIMOCK

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 21st day of June, 1930, before me came E. J. DIMOCK, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau

Defendant's Exhibit A.

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County New York; that he knows Emily C. J. Folger to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw her execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A 206
Commission expires March 30, 1932

[SEAL]

SURROGATE'S COURT,
COUNTY OF NASSAU.

In the Matter of Proving the
Last Will and Testament of

HENRY C. FOLGER,
Deceased,

As a Will of Real and Personal
Property.

WAIVER OF
CITATION AND
OF SEC. 17 OF
DECEDENT
ESTATE LAW.

207

TO THE SURROGATE'S COURT OF THE COUNTY OF
NASSAU:

MARY F. WELLS, the undersigned, a sister of Henry C. Folger, deceased, does hereby appear in person and waive the issue and service of a citation in the above entitled matter and consent

208

Defendant's Exhibit A.

that said instrument bearing date March 10, 1927, be forthwith admitted to probate, and

WHEREAS, said Henry C. Folger left him surviving a widow, Emily C. J. Folger, and

209

WHEREAS, Section 17 of the Decedent Estate Law of the State of New York provides in substance that no person having a wife shall, by will, give to any charitable purpose more than one-half of his estate and that any such gift shall be valid to the extent of one-half and no more, and

WHEREAS, said Henry C. Folger left him surviving his two brothers, Stephen L. Folger and Edward P. Folger, and a sister, the undersigned Mary F. Wells, who, with the widow, would be the only persons who would share in any of his property undisposed of by will,

210

NOW, THEREFORE, the undersigned does hereby renounce and waive any interest which, under and by virtue of said Section 17 of the Decedent Estate Law, she might otherwise have had in any of the property formerly of said decedent, and does hereby accept as and for her sole interest in said property the disposition or dispositions made for her in said Last Will and Testament.

This renunciation and waiver of any interest under and by virtue of said Section 17 of the Decedent Estate Law (but not the waiver of issue and service of citation herein and consent to admission to probate) is made in consideration of waivers of the same character made or to be made by all persons interested, to-wit: the widow and said sister and brothers of said Henry C. Folger,

Defendant's Exhibit A.

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and shall be without force or effect unless and until all of said interested persons have made similar waivers.

Dated, June 20th, 1930.

MARY FOLGER WELLS

Witness:

E. J. DIMOCK

212

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

On this 21st day of June, 1930, before me came E. J. DIMOCK, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides in Manhasset, Nassau County, New York; that he knows Mary Folger Wells to be the individual described in and who executed the foregoing instrument; that he, the said subscribing witness, was present and saw her execute the same, and that he, the said witness, at the same time subscribed his name as witness thereto.

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HAROLD C. JESSE,
Notary Public,
New York Co.

Clerk's No. 130, Register's No. 2J46A
Commission expires March 30, 1932

[SEAL]

214

Defendant's Exhibit A.

SURROGATE'S COURT,
NASSAU COUNTY.

IN THE MATTER OF
Estate of
HENRY C. FOLGER,
Deceased.

STATE OF NEW YORK, }
215 COUNTY OF NASSAU, } ss.:

I, EDWIN W. WEEKS, Clerk of the Surrogate's Court of the County of Nassau, do hereby certify that I have compared the annexed copy of Waivers of Edward P. Folger, Stephen L. Folger, Emily C. J. Folger and Mary F. Wells, with the original thereof, as the same is filed in the office of the Surrogate of Nassau County, and that the said copy is a true and correct copy of the said original and of all thereof.

216

IN TESTIMONY WHEREOF, I have here-
unto subscribed my name and affixed
the seal of said Court, this 9th day of
[L. S.] October, 1936.

EDWIN W. WEEKS,
Clerk of the Surrogate's Court.

[SEAL]

Findings of Fact and Conclusions of Law. 217

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

218

This cause having come on to be tried at a term of the United States District Court for the Eastern District of New York held at the Federal Building, Borough of Brooklyn, City and State of New York, on November 17, 1936, before me, the undersigned, one of the Judges of said Court, and the plaintiff having appeared by Hawkins, Delafield & Longfellow, his attorneys herein, by C. O. Donahue, of Counsel, and the defendant having appeared by Leo J. Hickey, the then United States Attorney for the Eastern District of New York, his attorney herein, by John G. Dalton, assistant United States Attorney, of counsel, and the parties, by their said attorneys, having by stipulation filed at the opening of trial waived trial by jury

219

220 *Findings of Fact and Conclusions of Law.*

and consented to the trial and determination of the case by the Court without the intervention of a jury, and the said cause having been duly tried before the undersigned, and the allegations, proofs and arguments of the respective parties having been duly heard, and due deliberation having been had, I, the undersigned, one of the Judges of said Court, do hereby make and file pursuant to the stipulation of facts upon which the cause was submitted the following Findings of Fact and

221 Conclusions of Law, which have been agreed to by the respective attorneys pursuant to the decision of the Court embodied in an opinion dated April 14, 1937:

FINDINGS OF FACT

1. That on June 11, 1930, Henry C. Folger, a resident of the County of Nassau in the State of New York, and an attorney and counsellor at law of the State of New York, died leaving a Last Will and Testament which was thereafter,

222 and on June 25, 1930, duly admitted to probate by the Surrogate's Court of Nassau County.

2. That in and by said Last Will and Testament, Emily C. J. Folger, his widow, was nominated and appointed the Executrix thereof and Edward Jordan Dimock Substitutionary Executor thereof: that said Emily C. J. Folger duly qualified as such Executrix in conformity with the Laws of the State of New York, whereupon Letters Testamentary were duly issued to her, as such Executrix, by the said Surrogate's Court of Nassau County on June 25, 1930, and said Emily C. J. Folger at all times since the said date of

Findings of Fact and Conclusions of Law.

223

her appointment and up to February 21, 1936, the date of her death, acted as Executrix of and under said Last Will and Testament.

3. That said Emily C. J. Folger, as such Executrix as aforesaid, instituted this action prior to her death while she was a citizen of the State of New York, and a resident and inhabitant of the County of Nassau, State of New York, which is within the Eastern Federal Judicial District of New York.

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4. That said Emily C. J. Folger died a resident of the County of Nassau, State of New York, leaving a Last Will and Testament by which she appointed said Edward Jordan Dimock, a resident of Manhasset, Nassau County, New York, her Executor; said Last Will and Testament was duly admitted to probate on March 9, 1936, by the Surrogate's Court of the County of Nassau, and Letters Testamentary were issued on March 9, 1936, by the Surrogate's Court of Nassau County to Edward Jordan Dimock, who duly qualified, and has acted at all times since the date last mentioned and still is acting as Executor of and under said Last Will and Testament.

225

5. That the said Edward Jordan Dimock qualified as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, on March 30, 1936, and Letters Testamentary thereon were issued to said Edward Jordan Dimock by the Surrogate's Court of the County of Nassau on March 30, 1936, and he duly qualified and has acted at all times since said date last men-

Findings of Fact and Conclusions of Law.

tioned and still is acting as Substituted Executor of and under said Last Will and Testament.

6. By an order of this Court, dated May 1, 1936, Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, was substituted as plaintiff herein, in the place and stead of Emily C. J. Folger, deceased Executrix of the Last Will and Testament of Henry C. Folger, deceased.

7. That Walter C. Corwin, defendant, at all times from January 2, 1930, to and including August 20, 1933, was the Collector of Internal Revenue for the First District of New York, and during all that time was and still is a resident and inhabitant of the County of Kings, State of New York, which is in the said Eastern Federal Judicial District of New York.

(A) DEATH BENEFIT

8. That on July 1, 1926, Henry C. Folger was Chairman of the Board of Directors of the Standard Oil Company of New York, a New York corporation, and on that day said Standard Oil Company of New York made effective a so-called "Plan for Annuities and Insurance" as amended, which provided as follows:

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STANDARD OIL COMPANY OF NEW YORK
PLAN FOR ANNUITIES AND INSURANCE
AS AMENDED.

EFFECTIVE JULY 1, 1926.

PART ONE: ADMINISTRATION.

This plan shall be administered under the direction of the Board of Directors by a committee appointed by the Board known as "The Finance Committee." 230

PART TWO: ANNUITIES.

SECTION 1. ELIGIBILITY.

All employees of this Company are eligible for retirement on annuity under the following conditions:

A. REGULAR RETIREMENT.

1. Domestic Service. 231

All men who have reached the age of 65 years and women 55 years and who have been 20 years or longer in the continuous active service of this Company (except those coming within the provisions of Paragraph Number Two hereof), shall be retired on a regular allowance unless in individual cases some later date be fixed by the Board of Directors for such retirement.

2. Foreign Service.

All men and women who have reached the age of 55 years and who have been 20 years or longer

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in the continuous active service of the Company, outside of the United States of America or British Isles, shall be retired on a regular allowance, unless in individual cases, some later date be fixed by the Board of Directors for such retirement.

B. OPTIONAL OR DISCRETIONARY RETIREMENT.

1. Domestic Service.

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Any man who has reached the age of 55 years or any woman who has reached the age of 50 years, who has been 30 years or longer in the continuous active service of the Company, or any man who has reached the age of 60 years who has been 20 years or longer in the continuous active service of the Company (except those coming within the provisions of Paragraph Number Two hereof), may be retired on a regular allowance, either at his or her request, with the approval of the Board of Directors, or without the request of the employee, at the discretion of the Board of Directors.

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2. Foreign Service.

Any man or woman who has reached the age of 50 years, and who has been 20 years or more in the continuous active service of the Company outside of the United States of America or British Isles, may be retired on a regular allowance, either at his or her request, with the approval of the Board of Directors, or without the request of the employee, at the discretion of the Board of Directors.

SECTION 2. PAYMENTS.**A. AMOUNT OF PAYMENTS.**

The amount of payments for all such regular allowances which the Board authorizes shall be as follows:

For each year of continuous active service an allowance of 2 per cent. of the average annual pay during the five years next preceding retirement; but no regular allowance shall be in excess of 75 per cent. of such annual pay, except that for the first year from the date of retirement the annuitant shall receive an amount equivalent to the full salary in effect at the time of retirement.

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For the purpose only of computing the amount of the annuity to be paid to employees of American or European nationality who have been or may be in the Foreign Service, outside of their native countries, each year of such Foreign Service shall be computed as one and one-half times Domestic or Home Service; that is to say, should such employee be 5 years in the continuous active service of the Company in the United States of America or British Isles and 20 years in the continuous active service of the Company outside of the United States of America or British Isles and outside of his native country, the amount of the annuity would be computed as follows:

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Domestic Service 5 years	@ 2%—10%
Foreign Service 20 years plus	

10 years—30 years	@ 2%—60%
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A total of	70%
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The amount of annuity, however, shall in no case exceed the maximum of 75% of the average annual pay of the annuitant as determined above.

B. METHOD OF PAYMENTS.

Annuities are to be paid monthly by check to the order of the annuitant and mailed to his or her address.

239 **SECTION 3. GENERAL ANNUITY RULES.**

A. Annuities terminate at the death of the annuitant.

B. If in the judgment of the Board of Directors any annuitant engages in a business prejudicial to the interests of this Company or conducts himself in a manner prejudicial to the reputation of this Company, the Board of Directors by a majority vote may terminate his annuity.

240 C. If any annuitant re-enters the service of this Company his annuity shall terminate unless otherwise provided by the Board of Directors.

D. Proof of age when required shall be by affidavit, stating time and place of birth. The Company's records concerning an employee's length of service and his or her average earnings in salary or wages shall be conclusive for the purpose of this plan.

PART THREE: DEATH BENEFITS.

SECTION 1. ELIGIBILITY.

The beneficiaries of all employees of one year's continuous active service and the beneficiaries of all annuitants retiring on or after July 1, 1919,

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shall without contribution on their part be eligible to death benefits in accordance with and subject to the conditions and exceptions of the following plan:

SECTION 2. AMOUNT OF BENEFITS.

A. ACTIVE EMPLOYEES.

The amount of death benefits payable under this section of the plan to the beneficiaries of active employees subject to the conditions and exceptions hereinafter provided shall be in accordance with the following table:

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Term of Service	Benefit
1 year	3 months' full pay
2 years	4 " " "
3 "	5 " " "
4 "	6 " " "
5 "	7 " " "
6 "	8 " " "
7 "	9 " " "
8 "	10 " " "
9 "	11 " " "
10 " or more	12 " " "

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In determining the full pay of employees any allowance or payments for overtime shall not be included.

B. ANNUITANTS.

The amount of death benefits payable under this section of the plan to the beneficiaries of annuitants retiring on or after July 1, 1919, subject to the conditions and exceptions hereinafter pro-

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vided, shall be equal to 12 months' full pay at the rate which the annuitant was receiving at the time of his death.

SECTION 3. METHOD OF PAYMENTS.

A. All employees and all annuitants retiring on or after July 1, 1919, shall immediately designate in writing the name of the beneficiary or beneficiaries to whom the death benefits are to be paid and file same with the Company. Any such employee or annuitant shall have the privilege of revoking such designation or changing it at discretion by filing such revocation or new designation with the Company. If the name of no beneficiary shall have been filed or, if filed, the death of such beneficiary precedes the death of such employee or annuitant, such death benefits shall lapse, it being the intention of this plan that no one, except such designated beneficiary or beneficiaries surviving such employee or annuitant, shall have any claim for or be entitled to such death benefits or any part thereof.

B. Payments of death benefits to beneficiaries designated by the decedent and entitled thereto, as herein provided, shall be made monthly by check payable to the order of such beneficiaries.

SECTION 4. DEDUCTION ON ACCOUNT OF LIABILITY UNDER COMPENSATION OR OTHER LAWS.

Should this Company be liable to make payments to the estate or dependents of any deceased employee, or to any other person, under any State

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or Federal Compensation statute or other law making the Company liable because of the death of the employee, the amount which the Company is obligated to pay on account of said death will be deducted from the amount which would otherwise be payable to the beneficiaries hereunder, and in such case no payment will be made under this plan until the extent of such liability is determined.

PART FOUR: GENERAL RULES.

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SECTION 1. LENGTH OF SERVICE.

In reckoning the term of service of an employee, credit shall be given for the time of continuous active service:

First: With the Standard Oil Company of New York;

Second: With any company, or a subsidiary of any company, which is or has been owned or controlled by the Standard Oil Company of New York, both prior to and during the period of such ownership or control;

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Third: With any company which shall be or has been merged with, or whose assets shall be or have been acquired by the Standard Oil Company of New York, or by any of its subsidiaries, or which is a subsidiary or predecessor of, or has been merged with any such company;

Fourth: With the Standard Oil Company (incorporated in New Jersey), or any company owned

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or controlled by said Standard Oil Company (incorporated in New Jersey), prior to the dissolution in 1911, and which employee as a result of adjustments and transfers immediately following such dissolution became an employee of the Standard Oil Company of New York or of any company owned or controlled by it.

SECTION 2. OTHER PROVISIONS.

- 251 The annuities and benefits herein provided for are voluntary grants by the Company and this plan shall not be construed as giving any employee the right to be retained in the service of the Company, or any right or claim to an annuity or death benefits to his beneficiaries after discharge from the service of the Company.

The Company reserves the right at any time at its discretion to withdraw or modify this plan, either as to annuities or death benefits.

- 252 Death benefits will be paid in accordance with the plan as it is in effect at the date of the death of the employee or annuitant.

When once an annuity has accrued and been granted as a regular allowance, it will be continued for the life of the annuitant, subject, however, to the provisions of this plan as it is in effect at the time such annuity is granted.

The above plan is to go into effect as of July 1, 1926.

9. That said Henry C. Folger thereafter, and prior to the commencement of this action, became

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an annuitant under said Plan for Annuities and Insurance by his retirement from the said Standard Oil Company of New York on February 29, 1928, and under and by virtue of said plan he was entitled to designate in writing the name of a beneficiary or beneficiaries to whom death benefits were to be paid.

10. That at the time of his death, Henry C. Folger was receiving an annuity of \$81,500, payable in equal monthly installments, and had designated his wife, Emily C. J. Folger, as the beneficiary to whom death benefits were to be paid, and that after his death, and on the first day of each and every month commencing August 1, 1930, pursuant to such plan and designation, said Emily C. J. Folger received from said Standard Oil Company of New York, as a death benefit under said plan, in equal monthly installments, the total sum of \$81,500, being an amount equal to an annuity for one year.

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11. That the Commissioner of Internal Revenue, in making his determination of the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended, included as part of the gross and net estates of said Henry C. Folger, the sum of \$79,791.63, being the value properly determined as of the date of the death of said Henry C. Folger of the right to receive said death benefit of \$81,500 in equal monthly instalments for twelve months.

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12. That the death benefit did not constitute property of Henry C. Folger during his lifetime.

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13. That Henry C. Folger made no expenditure for the purpose of having the death benefit pass to another upon his death.

14. That Henry C. Folger made no transfer of the death benefit.

15. That the death benefit did not constitute insurance taken out by Henry C. Folger upon his own life.

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(B) AS TO TAX ON WHOLE OF JOINT ESTATE.

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16. That at the time of the death of Henry C. Folger, he and Emily C. J. Folger were the joint owners of shares of stock in certain corporations held in joint accounts as joint tenants and not as tenants in common nor as tenants by the entirety under and pursuant to the laws of the State of New York; that the entries registering such shares of stock upon the books of the corporations issuing the same were made while both Henry C. Folger and Emily C. J. Folger were residents of the State of New York; that Henry C. Folger and Emily C. J. Folger were residents of the State of New York continuously from prior to 1900 to the dates of their deaths in 1930 and 1936 respectively.

17. That (a) the names of the corporations whose stock was held at the date of death of Henry C. Folger, in such joint tenancies created prior to September 9, 1916, (b) the dates on which the joint accounts were created in the stock of such corporations, (c) the number of

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shares held in such joint accounts immediately prior to September 9, 1916, and (d) the number of shares held in such joint accounts on the date of death of Henry C. Folger, were as follows:

<i>Corporation</i>	<i>Date Joint Account Created</i>	<i>Shares held prior to 9/9/16</i>	<i>Shares held at date of death</i>	
Indiana Pipe Line Com- pany	2/ 5/15	1	3	260
New York Transit Com- pany	2/ 5/15	1	2	
Northern Pipe Line Com- pany	2/ 5/15	1	1	
The Ohio Oil Company.	7/13/14	1075	4300	
The Prairie Oil and Gas Company	7/20/14	165	1680	
The Prairie Pipe Line Company	2/ 9/15	84	1260	
The Solar Refining Com- pany	2/ 6/15	1	8	
South Penn Oil Company	6/ 2/14	20	192	
Standard Oil Company (California)	7/16/14	2095 $\frac{1}{2}$	24730	261
Standard Oil Company (Indiana)	4/17/14	403	10440	
The Standard Oil Com- pany (Kansas)	3/19/15	1	16	
Standard Oil Company (Nebraska)	2/ 9/15	2	36	
Standard Oil Company (N. J.)	5/19/14	825	12250	
Standard Oil Company of New York	5/29/14	676	8265	
Swan Finch Oil Corpora- tion	4/30/20	0	4	
Swan Finch Oil Corpora- tion (preferred)	9/ 3/29	0	1	

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All of the stock so held was common stock except where stated to the contrary.

18. That the names of the corporations whose stock was so owned, the market value at the date of the decedent's death and the number of shares of each kind of stock, the names in which the shares were registered and the forms of registration are found to be correctly set forth in Exhibit "B" annexed to the complaint herein which was verified August 27, 1935.

19. That the number of shares shown as held in such joint tenancies prior to September 9, 1916, the date of the first passage of any Federal Estate Tax Law, were increased to the number of shares held at the date of death of Henry C. Folger by the receipt of shares resulting (a) from the splitting up of the shares into which the capital of the corporation was divided so as to increase the number thereof, and (b) by the receipt of shares issued as stock dividends, and in no other way, except that 1248 shares of stock of Standard Oil Company (California), 1170½ shares of stock of Standard Oil Company (N. J.) and 5 shares of Swan Finch Oil Corporation were purchased for cash by Henry C. Folger, all of which is accurately set forth in detail in "Exhibit C" annexed to plaintiff's complaint.

20. That all of the stocks in the said joint accounts in the names of "Henry C. or H. C. Folger and Emily C. J. Folger, or the survivor" are either (1) stock which was the property of the decedent, originally registered in his name, which

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was transferred by him to the joint account; or (2) stock purchased by the decedent and registered in the said joint names in the first instance; or (3) stock purchased by the decedent and given by him to Emily C. J. Folger, registered in her name, and subsequently transferred to the joint account by her; or (4) the proceeds of stock dividends or the exercise of stock rights and increases by split-ups which were derived from stock of the preceding three classes.

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21. That the value as of the date of the death of Henry C. Folger of the shares attributable to the cash paid after September 9, 1916, for stock purchased, was \$166,641.87 and the death value of all of the shares held in such joint tenancies was \$3,773,661.06, leaving \$3,607,019.19 as the death value of the shares attributable to the stock held prior to September 9, 1916, which shares will hereinafter be sometimes referred to for convenience as the "Original Stock."

22. That said Original Stock at the date of the death of Henry C. Folger was held by Henry C. Folger and Emily C. J. Folger as joint tenants and not as tenants in common nor as tenants by the entirety.

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23. That the Commissioner of Internal Revenue in making his determination of the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended, included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06, representing the whole value as of the date of

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death of the said shares of stock jointly owned by Henry C. Folger and Emily C. J. Folger, without deducting, in accordance with the claim of the estate of Henry C. Folger, the sum of \$1,803,509.59, representing one-half of the sum of \$3,607,019.19, the value as of the date of the death of said Original Stock.

(C) AS TO THE PART OF THE JOINTLY OWNED
PROPERTY TRANSFERRED TO THE JOINT TENANCY
269 BY THE SURVIVING JOINT TENANT.

24. That prior to May 29, 1912, Emily C. J. Folger acquired 251 shares of the capital stock of the Standard Oil Company of New York, which shares were given to her by the decedent, Henry C. Folger, and were registered in said Emily C. J. Folger's individual name on the books of said company.

270 25. That on February 9, 1916, Emily C. J. Folger transferred to one of said joint accounts 250 of the said 251 shares of the stock of the Standard Oil Company of New York from her individual account; the Original Stock so transferred had a market value of \$126,791.14 at the date of the death of the decedent, Henry C. Folger.

26. That prior to March 10, 1914, Emily C. J. Folger acquired 656½ shares of the capital stock of the Standard Oil Company (California), which shares were given to her by the decedent, Henry C. Folger, which stock was registered in said Emily C. J. Folger's individual name on the books of said company.

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27. That on the dates hereinafter set forth, Emily C. J. Folger transferred to another of said joint accounts the said 656½ shares of the capital stock of the Standard Oil Company (California) as follows: On February 9, 1915—1½ share, and on February 24, 1916—656 shares; that Emily C. J. Folger transferred said shares from her individual account to the said joint account; said Original Stock had a market value of \$719,981.01 at the date of the death of the decedent, Henry C. Folger.

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28. That the transfers referred to in paragraphs "22", "23", "24" and "25" hereof are shown by items 13 and 16 of Exhibit "C", annexed to the complaint, and the market value thereof also appears in said Exhibit "C".

29. That no consideration in money or money's worth was ever paid to the decedent, Henry C. Folger, by Emily C. J. Folger, for any of the said stock in the joint account.

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30. That the Commissioner of Internal Revenue, in making his determination of the gross and net estates of said Henry C. Folger for the purposes of the assessment of the Federal Estate Tax pursuant to the Revenue Act of 1926 as amended, included as part of the gross and net estates of said Henry C. Folger the full sum of \$3,773,661.06, representing the value as of the date of death of all the stock held in the joint accounts, as aforesaid, without deducting, in accordance with the claim of the Estate of Henry C. Folger, the amount of \$846,772.15, representing the value, at

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the date of death of the said Henry C. Folger, of the Original Stock transferred to the joint accounts by Emily C. J. Folger.

(D) TAX PROCEEDINGS.

275 31. That pursuant to the provisions of the Revenue Act of 1926 and the amendments thereto, Emily C. J. Folger, as such Executrix as aforesaid, on or about June 8, 1931, made and executed the return for the estate tax on the estate of Henry C. Folger, deceased, on form No. 706, furnished by the defendant, the Collector of Internal Revenue for the First District of New York, for that purpose, and filed the same in duplicate on or about June 10, 1931, in the office of said defendant, the Collector of Internal Revenue for the First District of New York.

276 32. That on or about June 10, 1931, Emily C. J. Folger, as such Executrix as aforesaid, paid to the Collector of Internal Revenue for the First District of New York, as and for estate tax, \$43,611.18, the amount indicated as due with respect to the net estate deemed by her to be shown upon the face of said return less a credit of 80% thereof for state inheritance taxes.

33. That the net estate deemed by Emily C. J. Folger as such Executrix as aforesaid to be shown upon the face of said return amounted to \$2,814,144.52.

34. That on or about May 3, 1933, the Commissioner of Internal Revenue reviewed and audited said return and made certain increases in the

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amount of the estate of Henry C. Folger, deceased, and imposed an additional assessment against said estate, which increased the amount of the net estate to \$4,891,646.99 by adding to the amount of the net estate deemed by Emily C. J. Folger, as such Executrix as aforesaid, to be shown upon the face of the return the amounts, among others, (a) of the death benefit from the Standard Oil Company of New York heretofore referred to, amounting to \$79,791.63, and (b) of an additional one-half of the value of the Original Stock jointly owned under a tenancy created prior to the passage of any Federal estate tax law, heretofore referred to, amounting to \$1,803,509.59.

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35. That the Commissioner of Internal Revenue, in assessing an additional estate tax based upon said increase in the amount of the net estate, credited against said estate tax to the extent of 80% thereof the amount of state, estate, inheritance, legacy and succession taxes which had been paid in respect of property included in the gross estate.

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36. That the tax so assessed as aforesaid upon a basis arrived at by including such increase and after giving effect to such 80% credit amounted to \$54,054.94, of which the sum of \$49,765.82 resulted from the inclusion of the death benefit paid by the Standard Oil Company of New York to Emily C. J. Folger, amounting to \$79,791.63, and of an additional one-half of the value of the Original Stock jointly owned under a tenancy created prior to the passage of any Federal estate tax law, amounting to \$1,803,509.59.

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37. That on or about May 3, 1933, the defendant, Walter C. Corwin, Collector of Internal Revenue for the First District of New York, demanded of the said Emily C. J. Folger, as such Executrix as aforesaid, payment of said sum of \$54,054.94, with interest thereon from June 11, 1931, to April 26, 1933, amounting to \$6,077.85, all as and for a claimed estate tax with interest thereon.

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38. That on or about May 17, 1933, Emily C. J. Folger, as such Executrix as aforesaid, paid to the defendant, Walter C. Corwin, Collector of Internal Revenue for the First District of New York, the sums of \$54,054.94, and \$6,077.85, as interest thereon to April 26, 1933, in response to said demand.

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39. That on or about July 8, 1933, Emily C. J. Folger, as such Executrix as aforesaid, filed with the defendant Walter C. Corwin, Collector of Internal Revenue for the First District of New York, on form 843 furnished by the defendant, a claim for the refund of the principal sum of \$52,035.41, and the interest, paid upon the same, of which principal sum the amount of \$49,765.82 represented the tax on the items mentioned in paragraph 36 hereof; on September 12, 1933, the Commissioner of Internal Revenue rejected the said claim and this action was commenced within two years after such rejection.

(E) AS TO DEFENDANT'S FIRST AFFIRMATIVE
DEFENSE.

40. That the funds sought to be recovered herein were collected by the defendant, Walter C. Corwin, in his official character as Collector of In-

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ternal Revenue for the First District of New York, from the estate of Henry C. Folger, deceased; that said funds were paid by defendant, as such Collector of Internal Revenue, into the Treasury of the United States.

41. That in collecting the sum of \$55,361.41, defendant acted under the directions of the Commissioner of Internal Revenue, a proper officer of the government, who made an additional assessment of estate tax against the estate of Henry C. Folger, deceased, and directed defendant to collect such additional estate tax.

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42. That there was probable cause for defendant's act of collecting the said sum of \$55,361.41 as additional estate tax and interest from the estate of Henry C. Folger.

(F) AS TO DEFENDANT'S SECOND AFFIRMATIVE
DEFENSE.

43. That in the Federal estate tax return filed by Emily C. J. Folger, as Executrix of the estate of Henry C. Folger, deceased, on June 10, 1931, with defendant, a gross estate of \$15,602,729.24, and deductions of \$12,788,584.72, were reported, resulting in a net estate of \$2,814,144.52.

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44. That thereafter the Commissioner of Internal Revenue made an audit and review of said estate tax return and fixed the total value of decedent's gross estate at \$15,359,827.69, allowed deductions of \$10,468,180.70, and determined a net estate of \$4,891,646.99.

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45. That in determining said net estate, the said Commissioner allowed a total deduction on account of decedent's bequests to charity of \$6,396,898.00.

46. That after the death of Henry C. Folger, all persons who under the intestate laws of the State of New York would be entitled to a share of his estate executed written waivers of any objections to the Will of Henry C. Folger, which they may have had under Section 17 of the Decedent Estate Law of New York; that said waivers were dated June 21, 1930, and were embodied in waivers of the issue and service of citations upon the probate of the Will of Henry C. Folger.

47. That the decedent, Henry C. Folger, in his last Will and Testament provided in part as follows:

(Article Fifth printed at pp. 52-55, inc.)

48. That the bequests made by decedent to The Trustees of Amherst College were bequests to a corporation organized and operated exclusively for charitable purposes as defined in Section 303, subdivision (a) (3) of the Revenue Act of 1926 as amended.

49. That the bequests, on account of which said deduction in the sum of \$6,396,898.00 is allowed, have been or will be paid to The Trustees of Amherst College.

50. That the debts of Henry C. Folger, deceased, at the time of his death amounted to \$3,971,282.61.

CONCLUSIONS OF LAW

DEATH BENEFIT

1. That the death benefit having a value at the date of death of Henry C. Folger of \$79,791.63, which was paid by the Standard Oil Company of New York to Emily C. J. Folger did not constitute property of the decedent Henry C. Folger under Section 302 of the Revenue Act of 1926 as amended, or under subdivision (a) of said section; that Henry C. Folger's act of naming Emily C. J. Folger as the recipient of the death benefit was not a transfer of property by him to her within the meaning of subdivisions (c) or (d) of Section 302 of the Revenue Act of 1926 as amended; that said death benefit did not constitute insurance taken out by Henry C. Folger upon his own life within the meaning of subdivision (g) of Section 302 of the Revenue Act of 1926 as amended.

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2. That the inclusion of the sum of \$79,791.63 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

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3. That the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the value of the death benefit in the amount of \$79,791.63 against Emily C. J. Folger as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and was without legal sanction.

4. That the payment of said additional tax, with interest thereon, was exacted of Emily C. J. Folger as such Executrix as aforesaid by defendant illegally and without warrant of law.

AS TO JOINTLY-OWNED PROPERTY

5. That at the time of the death of Henry C. Folger, he and Emily C. J. Folger were the owners of shares of stock, having a value as of the date of death of \$3,773,661.06, as joint tenants and not as tenants in common nor as tenants by the entirety, under and pursuant to the laws of the State of New York which governed the tenancies and incidents of the tenancies created in such shares of stock.

6. That said joint tenancies to the extent of shares of stock having a value at the date of the death of Henry C. Folger of \$3,607,019.19, hereinafter sometimes referred to as the "Original Stock" were created prior to the enactment of the first Federal Estate Tax Law on September 9, 1916.

7. That on the dates when said joint tenancies in said original stock were created, Henry C. Folger and Emily C. J. Folger each became seized respectively of such shares of stock per my et per tout.

8. That the Commissioner of Internal Revenue properly determined that the value of the stock held in the joint account of "Henry C. Folger and Emily C. J. Folger, or the survivor", of \$3,773,881.06, should be included in the gross and net estates of the decedent for estate tax purposes.

**AS TO THE PART OF THE JOINTLY OWNED PROPERTY
TRANSFERRED TO THE JOINT TENANCY BY THE
SURVIVING JOINT TENANT.**

9. That on or about February 9, 1916, Emily C. J. Folger transferred to one of said joint accounts 250 shares of the capital stock of the

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Standard Oil Company of New York which then belonged to her.

10. That on or about February 9, 1916, Emily C. J. Folger transferred to another of said joint accounts $\frac{1}{2}$ share of the capital stock of the Standard Oil Company (California) which then belonged to her; that on or about February 24, 1916, Emily C. J. Folger transferred to a joint account 656 shares of the capital stock of the Standard Oil Company (California) which then belonged to her.

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11. That the Original Stock so transferred had a market value at the date of death of Henry C. Folger, deceased, of \$846,772.15.

12. That the Commissioner of Internal Revenue properly determined that no part of the value of the joint account, representing property transferred thereto by Emily C. J. Folger, should be excluded from the gross and net estates, because Emily C. J. Folger received the same from the decedent without giving any consideration in money or money's worth.

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AS TO DEFENDANT'S FIRST AFFIRMATIVE DEFENSE.

13. That there was probable cause for defendant's act of collecting as additional estate tax and interest thereon the sum of \$55,361.41 from the estate of Henry C. Folger.

14. That the defendant's first affirmative defense is insufficient in law.

AS TO DEFENDANT'S SECOND AFFIRMATIVE DEFENSE.

15. That the bequests made by Henry C. Folger, deceased, to The Trustees of Amherst College

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were bequests made to a corporation organized and operated exclusively for charitable purposes as defined in Section 303, subdivision (a) (3) of the Revenue Act of 1926 as amended; that the sum of \$6,396,898 was properly allowed as a deduction by the Commissioner of Internal Revenue in determining the estate tax upon the estate of Henry C. Folger, deceased, and such allowance was valid and according to law.

299 16. That the probate of the Will of Henry C. Folger, coupled with the waivers with respect to rights under Section 17 of the Decedent Estate Law of New York, established once and for all the proportion of the estate going to charity.

17. That the defendant's second affirmative defense is insufficient in law.

JUDGMENT TO WHICH PLAINTIFF IS ENTITLED.

300 18. That plaintiff is entitled to judgment against defendant in the sum of \$2,483.96, with interest thereon from May 17, 1933, together with the costs and disbursements of this action, said sum of \$2,483.96, representing \$2,234.17 tax, and \$249.79 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$79,791.63, being the value of said death benefit.

I direct that judgment be entered accordingly.

Dated, Brooklyn, New York, March 14th, 1938.

MORTIMER W. BYERS,
United States District Judge.

**Plaintiff's Requests for Conclusions of Law and
Exceptions.** 301

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

302

Plaintiff requests the Court to make the follow- 303
ing conclusions of law:

1. That as to the Original Stock held in such joint tenancies referred to in the Court's conclusion number 7, one-half thereof, or shares of a value of \$1,803,509.59, did not constitute part of the gross or net estate of the decedent Henry C. Folger under Section 302 of the Revenue Act of 1926 as amended, or any of the subdivisions of said section.

2. That the inclusion of said sum of \$1,803,509.59 in the gross and net estates of Henry C.

304 *Plaintiff's Requests for Conclusions of Law and Exceptions.*

Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

305 3. That the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the sum of \$1,803,509.59, the amount of an additional one-half of the value of the Original Stock held in such joint tenancies, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and without legal sanction.

4. That the payment of the said additional tax, with interest thereon, was exacted of Emily C. J. Folger, as such Executrix as aforesaid, by defendant, illegally and without warrant of law.

306 5. That the Original Stock transferred as stated in the Court's conclusion number 11 and having a market value of \$846,772.15 did not constitute part of the gross estate of the decedent, Henry C. Folger, within Section 302 of the Revenue Act of 1926 as amended, or any subdivision thereof.

6. That the inclusion of said sum of \$846,772.15 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

7. That the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the value of the

Plaintiff's Requests for Conclusions of Law and 307
Exceptions.

Original Stock so transferred to the joint accounts by Emily C. J. Folger prior to the enactment of any Federal estate tax law in the amount of \$846,772.15, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and was without legal sanction.

8. That the payment of said additional tax, with interest thereon, was exacted of Emily C. J. Folger as such Executrix as aforesaid by defendant illegally and without warrant of law. 308

9. That plaintiff, in addition to the amount of the judgment directed in the Court's conclusion number 18 is entitled to judgment in the sum of \$26,298.45, representing \$23,639.79 tax, and \$2,658.66 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$846,772.15, being the value of Original Stock transferred by Emily C. J. Folger to said joint tenancies, and also being a portion of one-half of the value of the Original Stock, with interest upon said sum of \$26,298.45 from the 17th day of May, 1933. 309

10. That plaintiff, in addition, is entitled to judgment in the sum of \$26,578.88, representing \$23,891.86 tax and \$2,687.02 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$956,737.44, being the remainder of one-half of the value of the Original Stock, with interest upon said sum of \$26,578.88 from the 17th day of May, 1933.

310 *Plaintiff's Requests for Conclusions of Law and Exceptions.*

In the event of a denial by the Court of plaintiff's requests for the foregoing conclusions of law or any part thereof, plaintiff respectfully requests the Court to grant an exception or exceptions to plaintiff.

Plaintiff also respectfully requests the Court to grant exceptions to the conclusions of law numbered 8 and 12 contained in the Court's findings of fact and conclusions of law dated March 14th, 1938.

Respectfully submitted,

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff.

Exceptions are allowed the plaintiff to the refusal of the Court to pass upon the foregoing requests submitted March 14, 1938 numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, and exceptions are also allowed to conclusions of law numbered 8 and 12 contained in the findings of fact and conclusions of law of the Court dated March 14, 1938, this 14th day of March, 1938.

MORTIMER W. BYERS,
United States District Judge.

Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions. 313

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839.

314

Comes now the above named defendant, by Har-
old St. L. O'Dougherty, Esquire, United States
Attorney, his attorney, and considering the same
to be material to the proper presentation of this
case, respectfully requests the Court to make and
enter the following special findings of fact and
conclusions of law. 315

I.

That the value as of the date of death of the
decedent's gross estate as defined by the Revenue
Act of 1926, as amended, less his debts, amount-

316 *Defendant's Request for Special Findings of Fact
and Conclusions of Law and Exceptions.*

ing to \$3,971,282.61, was \$11,388,545.08, and one-half of said amount as of the date of decedent's death was \$5,694,272.54.

II.

317 That the charitable institutions named in the Will of the decedent could not receive the excess over one-half of the estate of the said decedent in the absence of the charitable intent of the widow.

III.

The gift to charity to the extent of the excess over one-half of the estate is in effect one from Emily C. J. Folger and not from the decedent.

CONCLUSIONS OF LAW.

I.

318 That the defendant is entitled to judgment dismissing plaintiff's suit at plaintiff's cost.

II.

That the Commissioner of Internal Revenue properly determined that the value of the death benefit of \$79,791.63 received by Emily C. J. Folger as the named beneficiary of the decedent, should be included in the decedent's gross and net estates.

III.

Upon the facts and evidence in this case, this estate is not entitled to any deduction from the

Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions. 319

decedent's gross estate under Section 303(a) (3) of the Revenue Act of 1926 in excess of one-half of the value of the decedent's estate less his debts.

IV.

Under Section 17 of the New York Decedent's Estate Law, where the testator is survived by a widow, bequests to charity to the extent of the excess over one-half of said estate, less debts, is invalid and voidable. 320

V.

By reason of the right of the widow under Section 17 of the New York Decedent's Estate Law, charity takes the excess over one-half of the estate, less debts, by reason of the charitable intent of the widow rather than by reason of the provisions of the will of the testator.

VI.

321

An outstanding power to void a charitable bequest in part, such as that power in the widow under Section 17 of the New York Decedent's Estate Law, renders the bequest valueless to the extent that it is voidable.

VII.

The amount or value of the bequest must be determined as of the date of the decedent's death

322 *Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions.*

and subsequent events affecting the value such as the waiver by the widow of her rights under Section 17, must be ignored.

VIII.

The limitation upon the charitable bequests as imposed by the New York law is equally as effective as if imposed by the testator's will.

323

IX.

The resulting value of the bequest to charity has the same limitation in value as it would if the interest of the widow was a vested property right.

X.

If charity receives in excess of one-half of the testator's estate, such receipt is actually and essentially the result of the benevolence of the widow in waiving the provisions of Section 17 of the New York Decedent's Estate Law.

324

XI.

Deduction should not be allowed from the decedent's gross estate in excess of one-half of the value of the estate, less debts, by reason of the provisions of Section 17 of the New York Decedent's Estate Law.

In the event of a denial by the court of defendant's requests for special findings of fact and

Defendant's Request for Special Findings of Fact and Conclusions of Law and Exceptions. 325

conclusions of law or any part thereof, defendant respectfully requests the court to grant an exception or exceptions to defendant.

Defendant also respectfully requests the court to grant exceptions to conclusions of law numbered I, II, III, IV, XIV, XV, XVI, XVII, XVIII contained in conclusions of law of the Court dated March , 1938.

Respectfully submitted, 326

HAROLD ST. L. O'DOUGHERTY,
United States Attorney,
Eastern District of New York.

Exceptions are allowed the defendant to the refusal of the Court to pass upon the foregoing requested Findings of Fact numbered I, II and III and Conclusions of Law numbered I, II, III, IV, V, VI, VII, VIII, IX, X and XI submitted Mar. 14, 1938, and exceptions are also allowed to Conclusions of Law numbered 1, 2, 3, 4, 14, 15, 16, 17 and 18 contained in the findings of fact and conclusions of law of the Court dated, March 14th, 1938, this 14th day of March, 1938. 327

MORTIMER W. BYERS,
United States District Judge.

328

Stipulation and Order Settling Bill of Exceptions.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

329

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

330

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the foregoing bill of exceptions contains all the material facts, matters, things, proceedings, rulings, and exceptions thereto, occurring upon the trial of said cause, and not heretofore a part of the record herein, including all evidence adduced at the trial, and that the exhibits set forth or referred to, or both, in the foregoing bill of exceptions, constitute all of the exhibits offered in evidence at the said trial, and that the same may be settled and allowed in the form proposed

Stipulation and Order Settling Bill of Exceptions. 331

and submitted, and ordered on file as the bill of exceptions herein.

Dated, New York, N. Y., June /3 , 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff-Appellant.

MICHAEL F. WALSH,
Attorney for Defendant-Appellant,

By VINE H. SMITH, 332
Asst. U. S. Attorney.

Upon the foregoing stipulation of the attorneys for the respective parties hereto, it is hereby

ORDERED, that the foregoing bill of exceptions be and the same hereby is settled and allowed in this cause and it is hereby directed that the same be filed as a part of the record herein.

Dated, New York ^{Brooklyn} N. Y., June /4th , 1938.

MORTIMER W. BYERS, 333
U. S. D. J.

334

Opinion of Court.**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

335

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839

April

14, 1937.

336

HAWKINS, DELAFIELD & LONGFELLOW, Esq's., attor-
neys for plaintiff (E. J. Dimock, C. O. Dona-
hue, A. F. Strashburger, Jr., and J. D. Rawl-
ings, Esqs., of counsel).

LEO J. HICKEY, Esq., United States Attorney, at-
torney for defendant (James W. Morris, Esq.,
Asst. Attorney General, Andrew D. Sharpe
and Clarence E. Dawson, Esqs., Special As-
sistants to Attorney General, and John G.
Dalton, Esq., Asst. U. S. Attorney, of coun-
sel).

BYERS, D. J.:

This is an action at law in which recovery is
sought of certain alleged overpayments of Federal
estate taxes in connection with the estate of Henry
C. Folger, deceased.

The decedent died on June 11, 1930, a resident of this district and on June 10, 1931, his executrix filed a Federal estate tax return; these issues concern certain contested items, as to all of which the tax was paid under protest; recovery as to them is now sought.

There are no issues of fact, and the evidence is to be found in the pleadings and stipulations of facts, corporate records concerning the issuance of the stock hereinafter referred to, and sundry stock certificates.

338

The questions may be conveniently stated as follows:

I. Was the death benefit paid by the Standard Oil Company of New York to Mr. Folger's wife part of his estate and taxable as such?

The answer turns upon the construction applicable to a "Plan for Annuities and Insurance as amended, effective July 1, 1926", promulgated by the Standard Oil Company of New York, of which the decedent was an employee and officer for many years. It has to do with annuities payable to employees who become eligible for retirement or annuity upon reaching a certain age and after having rendered a stated term of service to the Company.

339

Part Two, Section 2, deals with the amount of payments upon retirement and the method; it is not disputed that the decedent was in receipt of such an annuity following his retirement, which occurred on February 29, 1928, namely, the sum of \$81,500.00 per year, payable in equal monthly instalments. No question arises in reference to that aspect of the plan.

340

Opinion of Court.

Issue is made, however, with reference to a death benefit treated in Part Three, the pertinent provisions of which are:

"Section 1. Eligibility.

341

"The beneficiaries of all employees of one year's continuous active service and the beneficiaries of all annuitants retiring on or after July 1, 1919, shall without contribution on their part be eligible to death benefits in accordance with and subject to the conditions and exceptions of the following plan:"

(The maximum benefit was twelve months' full pay, which applied in this case.)

"Section 2, Subdivision B. Annuitants.

342

"The amount of death benefits payable under this section of the plan to the beneficiaries of annuitants retiring on or after July 1, 1919, subject to the conditions and exceptions hereinafter provided, shall be equal to 12 months' full pay at the rate which the annuitant was receiving at the time of his death."

"Section 3. Method of Payments.

"A. All employees and all annuitants retiring on or after July 1, 1919, shall immediately designate in writing the name of the beneficiary or beneficiaries to whom the death benefits are to be paid and file same with the Company. Any such employee or annuitant shall have the privilege of revoking such designation or changing it at discretion by filing

Opinion of Court.

343

such revocation or new designation with the Company. If the name of no beneficiary shall have been filed or, if filed, the death of such beneficiary precedes the death of such employee or annuitant, such death benefits shall lapse, it being the intention of this plan that no one, except such designated beneficiary or beneficiaries surviving such employee or annuitant, shall have any claim for or be entitled to such death benefits or any part thereof."

344

"Section 4. Deduction on Account of Liability Under Compensation or Other Laws.

"Should this Company be liable to make payments to the estate or dependents of any deceased employee, or to any other person, under any State or Federal Compensation statute or other law making the Company liable because of the death of the employee, the amount which the Company is obligated to pay on account of said death will be deducted from the amount which would otherwise be payable to the beneficiaries hereunder, and in such case no payment will be made under this plan until the extent of such liability is determined."

345

"PART FOUR: GENERAL RULES."

"Section 2. Other Provisions.

"The annuities and benefits herein provided for are voluntary grants by the Company and this plan shall not be construed as giving any employee the right to be retained in the service of the Company, or any right or claim

to an annuity or death benefits to his beneficiaries after discharge from the service of the Company.

"The Company reserves the right at any time at its discretion to withdraw or modify this plan, either as to annuities or death benefits.

"Death benefits will be paid in accordance with the plan as it is in effect at the date of the death of the employee or annuitant.

347

"When once an annuity has accrued and been granted as a regular allowance, it will be continued for the life of the annuitant, subject, however, to the provisions of this plan as it is in effect at the time such annuity is granted."

348

The decedent had designated his wife, Emily C. J. Folger, as the beneficiary to whom should be paid the death benefit contemplated by the plan, and commencing August 1, 1930, she duly received in twelve equal monthly instalments the total sum of \$81,500.00 pursuant to said plan.

The value of the last-named sum at the time of the death of the decedent was \$79,791.63, which the Commissioner of Internal Revenue included as part of the gross and net estates of the said decedent, and the legality of such inclusion now requires determination.

The applicable statute is the Revenue Act of 1926, Section 302, which reads:

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all prop-

erty, real or personal, tangible or intangible, wherever situated.

“(a) To the extent of the interest therein of the decedent at the time of his death.”

It is argued for the defendant that “Mr. Folger’s death was the generating source of an important benefit to his beneficiary and the value of that benefit at the date of his death should be included” as was done; that “this statute fully contemplates the inclusion of a payment of this nature.” 350

The precise property of the decedent is asserted to have been his right—which was exercised—“to designate the beneficiary of his death benefit.”

It becomes necessary to inquire then as to the constituency of that privilege which pertained to the decedent, in order to ascertain whether it conformed to any recognized definition or understanding of what the law knows as property.

The inquiry is not illuminated by judicial construction of this statute, but under date of March 8, 1937, Vol. XVI, No. 10, of the Internal Revenue Bulletin contains an opinion of Chief Counsel for the Bureau of Internal Revenue which is flatly opposed to the defendant’s contention. The cases of *McNevin v. Solvay Process Co.*, 53 N. Y. Supp. 98; *Dolge v. Dolge*, 75 N. Y. Supp. 386 and *Burgess v. First National Bank*, 220 N. Y. Supp. 134, are cited to vindicate the view that under a comparable state of facts “* * * it is clear that the decedent’s interest in the death benefit prior to his death was nothing more than an expectancy, which is not a property right and, therefore, not includible in his gross estate under Section 302 (a) as amended”. 351

352

Opinion of Court.

It was further the opinion that the death benefit did not constitute insurance under Section 302 (g), i. e.:

353

"The liability of the M company for the payment of the death benefit to the beneficiary designated by the decedent did not arise until the death of the decedent. Consequently, the decedent had no contractual or vested right in the death benefit during his lifetime."

The foregoing views have been formulated with care, and require consideration on this branch of the case.

The defendant's argument is that, when the decedent designated his wife to receive the benefit, "he transferred to her his beneficial interest in the plan which was intended to take effect in enjoyment at his death."

354

The foregoing betrays a complete misunderstanding of the difference between the annuity payable to Mr. Folger, and the death benefit payable to his wife. As to the latter, he was possessed of nothing during his life, save the capacity to nominate a person to whom, upon his death, the company could grant a sum called a death benefit. Any nomination which he might make was revocable by him; which means that he could substitute any number of persons in turn, depending upon his own notions. What he could not control, however, was the capacity of a nominee to qualify as a recipient, by surviving him. Thus it would have been possible for Mrs. Folger's death to occur prior to his, but under circum-

stances not affording him an opportunity to nominate some one in her place. If that had happened, exercise of the privilege to nominate would have failed to bring about the payment of a death benefit to any person at all.

It is no answer to say that, because these things did not occur, resort may not be had to the reflection that they were possible, because the nature of the capacity which pertained to the decedent must be so understood, in the process of determining whether it is fairly to be classified as property and taxable as such. 356

The distinction between a power of appointment, or the power to change a beneficiary named in a life insurance policy, and such a privilege as was accorded to this decedent under the terms of the plan, stands clearly revealed in the light of what has been written. Under either of the former, a fund or estate passes to some one in possession, as the result of the exercise of the power.

Here nothing may be payable, if the named beneficiary predeceases the annuitant, but since a payment did accrue, because the annuitant named a surviving beneficiary, that result is to be traced not to a transfer of anything from Mr. Folger to his wife, but to the circumstance that the annuity which he had enjoyed became extinct through his death, and a new relation came into existence between the company and Mrs. Folger. 357

The right to nominate or designate the person to receive the death benefit could not have been levied upon to satisfy a judgment against the decedent during his lifetime; had he become bankrupt, his trustee could not have realized anything thereon for creditors, nor could it have been sold

Opinion of Court.

or assigned by the decedent because it was merely a privilege extended to him by his employer, which was subject to withdrawal or modification at any time, under the quoted terms of the plan.

359 The cases cited by defendant are: *Klein v. U. S.*, 283 U. S. 231; *Chase National Bank v. U. S.*, 278 U. S. 327, and *Saltonstall v. Saltonstall*, 276 U. S. 260. The first determines that the grantor of certain real estate created a life estate for his wife, and by the same instrument, a contingent remainder in fee. Since the event upon which the latter would have become vested did not occur, an estate tax under an earlier statute, upon the value of the property, less the value of the life estate, was sustained. This case presents issues entirely alien to those under examination.

The second case has to do with Section 402 (f) of the Act of 1921 which affected life insurance policies in excess of \$40,000.00 upon the life of the decedent. That section, or its successor under the 1926 Act, is not presently involved.

360 The opinion is most instructive in pointing out the process leading to the conclusion that a transfer tax, as distinguished from a succession tax, applied to the power which that decedent possessed to change beneficiaries: "Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers."

Touching the argument that the proceeds of the policies were payable by the insurer, and not the

decendent, thus excluding a *transfer*, the court says: "Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."

These quotations are permissible to expose the precise inapplicability of the reasoning touching the taxable susceptibility of insurance policies, to the death benefit under the plan here presented. 362

There was no gift which Mr. Folger could either make or recall; he made no expenditure with the purpose, effected at his death, of having property pass to another.

The third case involved a succession tax under Massachusetts law which was held to have been properly assessed. It has no bearing upon this controversy.

It is concluded as to the first question, that there pertained to Mr. Folger, during his life, only the right to render it possible for Mrs. Folger to receive a grant from the Standard Oil Company, and that this did not constitute property of his under Section 302 of the law, or subdivision (a), and that the act of naming her as the recipient of the death benefit was not a transfer of property by him to her, so as to fall within subdivisions (c) or (d). 363

II. Was the property of Mrs. Folger in stocks jointly owned by her and her husband, properly included in the computation of the estate tax payable upon his estate?

Opinion of Court.

364

The facts concerning this branch of the case are:

The decedent and his wife were joint tenants of very considerable holdings of various Standard Oil stocks, the details concerning which have been stipulated according to Exhibit C, annexed to the complaint. .

365

The joint estate was constituted on or about May 1, 1916, which was prior, by over four months, to the enactment of the first Federal Estate Tax Law. Thereafter there were substantial accretions to this joint estate, as the result of stock dividends, split-ups, and the exercise of rights to subscribe. As to the latter, it is the value of the rights only which is asserted to have been improperly assessed.

The valuation of the joint estate as at the decedent's death is not in issue, but the contention is that but one-half thereof should have been included in fixing the amount payable for the purposes of the estate tax.

366

The applicable paragraphs of Section 302 of the law follow:

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full considera-

Opinion of Court.

367

tion in money or money's worth; Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants; * * *

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“(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.”

369

If the assessment had been made with reference to real estate held by Mr. and Mrs. Folger, as tenants by the entirety, its validity would not be

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Opinion of Court.

370

open to question, *Third National Bank & Trust Co. v. White*, 287 U. S. 577, even though the creation of the estate preceded the passage of the Federal Estate Tax statute.

371

Knox v. McElligott, 258 U. S. 546, does not avail the plaintiff here, even though a joint estate was involved in that case which had been created in 1912. The assessment there reviewed and set aside was upon the whole joint estate and was based upon the Act of September 8, 1916, which did not contain such a provision as subdivision (h) of Section 302 of the 1926 Act here presented. That decision is still the law: *Cahn v. U. S.*, 297 U. S. 691.

The validity of a tax upon the entire value of property held in entirety, upon the death of one of the tenants, was sustained in *Tyler v. U. S.*, 281 U. S. 497, where the estates had been created subsequent to the effective date of the 1916 Act.

372

The plaintiff rests his contentions upon the assertion that there is such a difference, in the legal sense, between a joint estate and an estate by the entirety, that decisions affecting the latter should not be deemed to control in the case of a joint tenancy.

Such interests were present in the two following cases:

Gwinn v. Commissioner, 287 U. S. 224—One-half of a joint estate in land, created in 1916, was held to have been properly included in an assessment laid under the 1924 law.

There had been no assessment upon the entire joint estate which was later reduced to one-half, as in *Griswold v. Helvering*, 290 U. S. 56, which involved a joint estate in land, created in 1909.

The court considered an objection based upon the alleged retroactive effect which was given to the law, and disposed of it tersely upon the ground that cessation of the interest of the deceased joint tenant "presented the proper occasion for the imposition of a tax. See *Gwinn v. Commissioner*, 287 U. S. 224, and cases cited."

The statute involved was Section 402 of the 1921 law, subdivision (d), reading: "(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person * * *." 374

Apparently the plaintiff's argument is that, because the inclusion of the moiety pertaining to the deceased joint tenant, in fixing the taxable value of his estate for the purpose of the estate tax, has been found proper, that course should have been followed in this case; which means that the inclusion of his interest in the whole estate, i. e., what he held "per tout", has not been sanctioned, and should now be disapproved.

That there is a difference in the legal aspect of the two estates has been recognized, since during the joint lives there may be a severance in the case of a joint tenancy, but not in an estate by the entirety, according to the decisions of the New York courts which are controlling: *Matter of Sutter*, 258 N. Y. 104; *Matter of Klatzel*, 216 N. Y. 83. 375

Had there been a severance in this case, it may be assumed that a tenancy in common would have been brought about, and the present issue would not have arisen.

So much of the argument as is based upon the objection to retroactive taxation, and the cases of *Nichols v. Coolidge*, 274 U. S. 531; *Helvering v.*

Helmholz, 296 U. S. 93, and *White v. Poor*, 296 U. S. 98, seems not to apply for the reason that the death of one joint tenant is the means whereby the consummation of the other's undefeasible title is accomplished, and it is that process which is taxable, without regard to the fact that its potential operation was a vital thing resting upon a legal foundation laid prior to the first taxing statute.

377 If such is the teaching of the *Tyler* case, *supra*, it is not perceived how there is any difference in principle between a joint estate, and an estate by the entirety, for present purposes.

The cessation of the seizure "per tout" on the part of Mr. Folger removed that element in Mrs. Folger's tenancy which was present so long as he lived, and did not differ in texture but in area from his seizure "per my", and the reasoning which validated the assessment of the latter would be equally persuasive when applied to the former.

The assessment therefore must be upheld, subject to examination of the next contention.

378 III. The next question concerns so much of the joint estate as was the sole property of Mrs. Folger at the time of the creation of the joint estate, and constituted her contribution thereto.

She had received these shares in two corporations in 1913 and 1914 as gifts from her husband, and the query is as to the propriety of their inclusion in this assessment.

Subdivision (e) of Section 302 already quoted, as to the following, is thus brought into question:

"(e) * * *, except such part thereof as may be shown to have originally belonged to such other person (Mrs. Folger) and never to have

been received or acquired by the latter from the decedent (her husband) for less than an adequate and full consideration in money or money's worth * * *."

It is clear that, if Mrs. Folger had owned the shares by virtue of a gift of them from her father for instance, they would have been excluded from the assessment. But the fact is that the gift was from her husband.

The joint estate was created in 1916 as has been said, a few months prior to the adoption of the estate tax. The chances are that the purpose of Mr. and Mrs. Folger was not entirely unrelated to the possible enactment of such legislation.

380

It is said in *Phillips v. Dime Trust & S. D. Co.*, 284 U. S. 160, a case under the 1924 statute, that language such as is above quoted had been present in the successive revenue acts, beginning with the 1916 law.

This means that the purpose of Congress to impose such a tax, under the circumstances stated in the statute, has been clearly revealed for over ten years, without having resulted in any construction which would limit its application, where one joint tenant contributes to the joint estate what has been received as a gift from the other, to cases in which the joint estate was created after the enactment of the law.

381

When it is considered that the entire joint estate of the decedent is taxable, the possible exemption of a designated element is a voluntary relinquishment by the government of such part of the tax as to it seems fair, and any construction of the exemption must be strict as against the taxpayer.

Opinion of Court.

382

In other words, the absence of any expression to qualify the provision that such exemption attaches only to that which is shown "never to have been received", etc., excludes any latitude of construction. There is no ambiguity about the word "never".

383

The plaintiff relies on *Heiner v. Donnan*, 285 U. S. 312, and *Lewellyn v. Frick*, 268 U. S. 238, but the points at issue in those cases are not here presented. In the first, the two-year period for presuming gifts *inter vivos* to have been made in contemplation of death, was ruled to be unconstitutional; and in the second, life insurance policies written many years prior to the 1916 law were held not to have been within the reach of the 1919 provisions of the law touching insurance in excess of \$40,000.00.

The retroactive argument has been considered and found to be unavailing in the light of authoritative decisions, and that is conclusive upon the whole as well as on each part of the joint estate.

384

The third question is resolved in favor of the defendant.

The final issue has to do with the affirmative defense, that because the decedent's estate has received the benefit of a deduction for charitable bequests in excess of one-half of the entire estate, notwithstanding Section 17 of the Decedent's Estate Law of New York, there can be no recovery of any part of the taxes paid.

The argument is that, despite the waiver by Mrs. Folger and the decedent's next of kin of any interest which by virtue of that law any of said persons might otherwise have had in any of the decedent's property, and the respective acceptances

Opinion of Court.

385

as the sole interest in his property of the disposition made in Mr. Folger's will, on the part of each of said persons, the proportion of the estate covered by charitable bequests was uncertain, contingent and not determined when the assessment was made. These waivers were executed on June 21, 1930, and were embodied in waivers of the issue and service of citations upon the probate of the will.

The assessment in question was made not less than one year thereafter.

386

The probate of the will under the circumstances related, coupled with the waivers with respect to the rights under Section 17 of the Decedent's Estate Law, established once and for all the proportion of the estate going to charity (See *Humphrey v. Millard*, 79 Fed. [2d] 107) and the exemption from Federal estate tax as to such portion of the estate, allowed by the Commissioner, was informed, deliberate and final.

The case cited is even stronger than this on the facts, because there the widow possessed the testamentary right to invade principal.

The affirmative defense is without legal basis to sustain it.

387

Judgment is ordered for plaintiff as to so much of the tax as represents the assessment made in connection with the death benefit only, to be settled on notice.

M. W. B.,
U. S. D. J.

388 **Memorandum of Court as to Findings and
Conclusions.**

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

389	<p>EDWARD JORDAN DIMOCK, as Sub- stituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;"><i>against</i></p> <p>WALTER C. CORWIN, Late Collec- tor of Internal Revenue, First District of New York,</p> <p style="text-align: right;">Defendant.</p>	} L-6839.
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February 8, 1938.

390 **HAWKINS, DELAFIELD & LONGFELLOW**, Esqs., attor-
neys for plaintiff.

HAROLD ST. L. O'DOUGHERTY, Esq., United States
Attorney, attorney for defendant.

MEMORANDUM.

BYERS, D. J.

Counsel will please draw one set of findings and conclusions to conform to the opinion of April 14, 1937.

I do not feel called upon to specifically refuse to make findings or conclusions that are contrary to the decision, in the absence of citation of authority binding upon me, to the effect that otherwise the appeal of either party will be ineffective. See Equity Rule 11 of this court.

Judgment.

391

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

392

No. L-6839.

The issues in this action having been duly brought on for trial before Hon. Mortimer W. Byers, United States District Judge, at a term of this Court held in and for the Eastern District of New York at the United States Court House in the Borough of Brooklyn, City and State of New York, on the 17th day of November, 1936, and the parties having duly stipulated that a trial by jury be waived and that the case be tried and determined by the Court without a jury, and all parties having appeared, and the Court having heard the allegations, proofs and arguments of the respective parties, and after due deliberation, having duly made and filed its decision in writing

393

Judgment.

394

and its findings of fact and conclusions of law in the office of the Clerk of this Court, in and by which judgment was directed to be entered in favor of the plaintiff and against the defendant for the sum of \$2,483.96 with interest thereon from the 17th day of May, 1933, and the costs and disbursements of this action, and such costs and disbursements having been duly taxed at \$26.00,

395

NOW, THEREFORE, on motion of Hawkins, Delafield & Longfellow, attorneys for the plaintiff, it is

396

ORDERED, ADJUDGED AND DECREED, that the plaintiff, Edward Jordan Dimock, as substituted executor of the Last Will and Testament of Henry C. Folger, Deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, Deceased, recover of the defendant, Walter C. Corwin, former Collector of Internal Revenue for the First District of New York, the sum of \$2,483.96 with interest thereon from the 17th day of May, 1933, as provided by Section 177 (b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936, together with the costs and disbursements of this action as taxed in the sum of \$26.00.

Judgment signed and entered this 21st day of March, 1938.

PERCY G. B. GILKES,
Clerk,

By J. G. COCHRAN,
Deputy Clerk.

Plaintiff's Petition and Order Allowing Appeal. 397

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

398

TO THE HONORABLE MORTIMER W. BYERS,
Judge of the District Court,
Eastern District of New York.

399

Now comes the plaintiff-appellant, Edward Jordan Dimock, as substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, by Hawkins, Delafield & Longfellow, his attorneys, and feeling himself aggrieved by the judgment of this Court entered on the 21st day of March, 1938, hereby prays that an appeal may be allowed to him from said judgment to the United States Circuit Court

400 *Plaintiff's Petition and Order Allowing Appeal.*

of Appeals for the Second Circuit and that citation issue, and, in connection with this petition, petitioner herewith presents his assignment of errors.

Petitioner further prays that an order be made fixing the amount of the bond to be given by plaintiff for costs, and a proper transcript of the record of proceedings and papers upon which said judgment was made, duly authenticated, shall be transmitted to the United States Circuit Court
401 of Appeals for the Second Circuit.

Dated, New York, N. Y., May 26, 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff-Appellant.

The above named appeal is hereby allowed.

Dated, Brooklyn, N. Y., May 27, 1938.

402

MORTIMER W. BYERS,
U. S. D. J.

An undertaking on appeal in the usual form was duly approved and filed in the office of the Clerk of the District Court on May 27, 1938.

Assignment of Errors and Prayer for Modification for Plaintiff-Appellant. 403

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collector of Internal Revenue, First District of New York,
Defendant.

404

Now COMES the plaintiff-appellant, Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, by Hawkins, Delafield & Longfellow, his attorneys, and submits, presents and files his assignments of error complained of and says: 405

That in the records and proceedings of the Honorable United States District Court for the Eastern District of New York in a certain action entitled, "Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of

406 *Assignment of Errors and Prayer for Modification
for Plaintiff-Appellant.*

Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, plaintiff, against Walter C. Corwin, Late Collector of Internal Revenue, First District of New York, defendant," and in the determination of the issues raised, there is manifest error to the injury and prejudice of the said appellant, and for such error the appellant assigns the following:

407

1. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon more than one-half of the value of the stock held by him in joint tenancy with Emily C. J. Folger prior to the passage of any Federal Estate Tax Act did not constitute a deprivation of property without due process of law in contravention of the Fifth Amendment of the Constitution of the United States of America.

408

2. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon more than one-half of the value of the stock held by him in joint tenancy with Emily C. J. Folger prior to the passage of any Federal Estate Tax Act was justified by the Federal Estate Tax Act.

3. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon the value of the stock contributed by Emily C. J. Folger to a joint tenancy of Henry C. Folger and Emily C. J. Folger prior to the passage of any Federal Estate Tax Act did not constitute a deprivation of property with-

*Assignment of Errors and Prayer for Modification
for Plaintiff-Appellant.* 409

out due process of law in contravention of the Fifth Amendment of the Constitution of the United States of America.

4. The said Court erred in ruling that the imposition of a Federal estate tax at the death of Henry C. Folger upon the value of the stock contributed by Emily C. J. Folger to a joint tenancy of Henry C. Folger and Emily C. J. Folger prior to the passage of any Federal Estate Tax Act was justified by the Federal Estate Tax Act. 410

5. The said Court erred in failing to make the conclusion of law that as to the Original Stock held in such joint tenancies referred to in the Court's conclusion number 7, one-half thereof, or shares of a value of \$1,803,509.59, did not constitute part of the gross or net estate of the decedent Henry C. Folger under Section 302 of the Revenue Act of 1926 as amended, or any of the subdivisions of said section. 411

6. The said Court erred in failing to make the conclusion of law that the inclusion of said sum of \$1,803,509.59 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

7. The said Court erred in failing to make the conclusion of law that the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of the sum

412 *Assignment of Errors and Prayer for Modification
for Plaintiff-Appellant.*

of \$1,803,509.59, the amount of an additional one-half of the value of the Original Stock held in such joint tenancies, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and without legal sanction.

413 8. The said Court erred in failing to make the conclusion of law that the payment of the said additional tax, with interest thereon, was exacted of Emily C. J. Folger, as such Executrix as aforesaid, by defendant, illegally and without warrant of law.

9. The said Court erred in failing to make the conclusion of law that the Original Stock transferred as stated in the Court's conclusion number 11 and having a market value of \$846,772.15 did not constitute part of the gross estate of the decedent, Henry C. Folger, within Section 302 of the Revenue Act of 1926 as amended, or any subdivision thereof.

414 10. The said Court erred in failing to make the conclusion of law that the inclusion of said sum of \$846,772.15 in the gross and net estates of Henry C. Folger, deceased, by the Commissioner of Internal Revenue was improper, illegal and erroneous.

11. The said Court erred in failing to make the conclusion of law that the assessment of an additional or deficiency tax based upon the increase of the gross and net estates of Henry C. Folger, deceased, resulting from the inclusion of

Assignment of Errors and Prayer for Modification 415
for Plaintiff-Appellant.

the value of the Original Stock so transferred to the joint accounts by Emily C. J. Folger prior to the enactment of any Federal Estate Tax Law in the amount of \$846,772.15, against Emily C. J. Folger, as Executrix of the Last Will and Testament of Henry C. Folger, deceased, was illegal, erroneous and was without legal sanction.

12. The said Court erred in failing to make the conclusion of law that the payment of said additional tax, with interest thereon, was exacted of Emily C. J. Folger as such Executrix as aforesaid by defendant illegally and without warrant of law. 416

13. The said Court erred in failing to make the conclusion of law that the plaintiff, in addition to the amount of the judgment directed in the Court's conclusion number 18 is entitled to judgment in the sum of \$26,298.45, representing \$23,639.79 tax, and \$2,658.66 interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$846,772.15, being the value of Original Stock transferred by Emily C. J. Folger to said joint tenancies, and also being a portion of one-half of the value of the Original Stock, with interest upon said sum of \$26,298.45 from the 17th day of May, 1933. 417

14. The said Court erred in failing to make the conclusion of law that the plaintiff, in addition, is entitled to judgment in the sum of \$26,578.88, representing \$23,891.86 tax and \$2,687.02

418 *Assignment of Errors and Prayer for Modification
 for Plaintiff-Appellant.*

interest thereon, improperly collected as a result of the inclusion in the gross and net estates of Henry C. Folger, deceased, of the sum of \$956,737.44, being the remainder of one-half of the value of the Original Stock, with interest upon said sum of \$26,578.88 from the 17th day of May, 1933.

419 15. The said Court erred in refusing to pass upon the plaintiff's requests for conclusions of law submitted March 14, 1938, numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

16. The said Court erred in making the conclusion of law that the Commissioner of Internal Revenue properly determined that the value of the stock held in the joint account of "Henry C. Folger and Emily C. J. Folger, or the survivor", of \$3,773,881.06, should be included in the gross and net estates of the decedent for estate tax purposes.

420 17. The said Court erred in making the conclusion of law that the Commissioner of Internal Revenue properly determined that no part of the value of the joint account, representing property transferred thereto by Emily C. J. Folger, should be excluded from the gross and net estates, because Emily C. J. Folger received the same from the decedent without giving any consideration in money or money's worth.

WHEREFORE, said plaintiff-appellant respectfully prays:

Assignment of Errors and Prayer for Modification 421
for Plaintiff-Appellant.

1. That the judgment entered in said action be modified by adding thereto the sum of \$26,298.45, with interest thereon from the 17th day of May, 1933.

2. That the judgment entered in said action be modified by adding thereto in addition the sum of \$26,578.88, with interest thereon from the 17th day of May, 1933.

3. That the lower court be directed to modify said judgment by adding thereto the sum of \$26,298.45, with interest thereon from the 17th day of May, 1933. 422

4. That the lower court be directed to modify said judgment by adding thereto in addition the sum of \$26,578.88, with interest thereon from the 17th day of May, 1933.

5. That said plaintiff-appellant have such other, further or different relief as may be just. 423

Dated, May 26, 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
 Attorneys for Plaintiff-Appellant, Ed-
 ward Jordan Dimock, as Substituted
 Executor of the Last Will and Testa-
 ment of Henry C. Folger, Deceased,
 and as Executor of the Last Will
 and Testament of Emily C. J. Fol-
 ger, Deceased.

424

Citation.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

425

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

426

To: WALTER C. CORWIN, Appellee,
and
MICHAEL F. WALSH, his Attorney;

GREETING: You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, held at Federal Courthouse in the Borough of Manhattan, City and State of New York, within thirty days from the date hereof, pursuant to an appeal filed in the office of the United States District Court, Eastern District of New York, at Brooklyn, New York, wherein Edward Jordan Dimock, as substituted Executor of the Last Will and Testament of

Citation.

427

Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, is appellant, and Walter C. Corwin, is appellee, to show cause, if any there be, why the judgment entered herein on the 21st day of March, 1938, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Mortimer W. Byers, Judge of the District Court of the United States, Eastern District of New York, on this 27th day of May, 1938. 428

MORTIMER W. BYERS,
U. S. D. J.

429

430

**Defendant's Notice of Appeal and Order
Allowing Appeal.**

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

431

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

L-6839

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

SIR:

432

PLEASE TAKE NOTICE that the defendant above
named hereby appeals to the United States Circuit
Court of Appeals for the Second Circuit from the
judgment of this Court in favor of the plaintiff,
and against the defendant in the sum of \$2,483.96,
together with interest and costs, entered in the
office of the Clerk of this Court on the 21st day
of March, 1938, and from each and every part of
said judgment, as well as from the whole thereof.

Dated, Brooklyn, New York,
1938.

Yours, etc.,

MICHAEL F. WALSH,
United States Attorney for the
Eastern District of New York,

*Defendant's Notice of Appeal and Order
Allowing Appeal.* 433

To:

Honorable PERCY G. B. GILKES,
Clerk,
United States District Court for the
Eastern District of New York,
United States Court House,
Brooklyn, New York.

Messrs. HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff, 434
49 Wall Street,
Borough of Manhattan,
New York City.

The appeal of the defendant above named as
prayed for in the foregoing petition is hereby
allowed.

Dated, Brooklyn, New York, June 1st, 1938.

MORTIMER W. BYERS, 435
U. S. D. J.

436 **Assignment of Errors for Defendant-Appellant.**

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

437 EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839

438 Now comes the defendant above named, Walter
C. Corwin, Late Collector of Internal Revenue,
First Collection District of New York, by his at-
torney, Michael F. Walsh, United States Attorney
for the Eastern District of New York, and pre-
sents his assignment of errors complained of as
follows:

1. That the trial court erred in directing the
entry of judgment in favor of the plaintiff for the
sum of \$2,483.96 with interest and costs, as set
forth in its conclusion of law number 18, p. 100, or
for any amount whatever.

2. That the court erred in failing to direct
judgment in favor of defendant dismissing this
action with costs.

Assignment of Errors for Defendant-Appellant. 439

3. That the court erred in holding plaintiff entitled to a deduction from decedent's estate for charitable bequests in excess of one-half the value of the said estate less its debts (Finding No. 43, p. 95; Concl. No. 15, pp. 99-100).

4. That the court erred in failing to hold that under Section 17 of the Decedent's Estate Law of New York, where the testator is survived by his widow, bequests to charity to the extent of the excess over one-half of his estate, less the debts, is invalid and voidable. 440

5. That the court erred in failing to hold that by reason of the right of the widow under Section 17 of the Decedent's Estate Law of New York, charity takes the excess over one-half of the estate, less debts, by reason of the charitable intent of the widow rather than by reason of the provisions of the will of the testator.

6. That the court erred in failing to hold that an outstanding power to void a charitable bequest in part, such as that power in the widow under Section 17 of the Decedent's Estate Law of New York, renders the bequest valueless to the extent that it is voidable. 441

7. That the court erred in failing to hold that the amount or value of the bequest must be determined as of the date of the decedent's death and that subsequent events affecting the value, such as the waiver by the widow of her rights under Section 17, must be ignored.

8. That the court erred in failing to hold that the limitation upon the charitable bequest as imposed by the New York law is equally as effective as if imposed by the testator's will.

442 *Assignment of Errors for Defendant-Appellant.*

9. That the court erred in failing to hold that the resulting value of the bequest to charity has the same limitation in value as it would have if the interest of the widow was a vested property right.

10. That the court erred in failing to hold that the receipt by charity of an amount in excess of one-half of the testator's estate is actually and essentially the result of the benevolence of the widow in waiving the provisions of Section 17 of the Decedent's Estate Law of New York.

11. That the court erred in holding, in its conclusion of law number 15, that the sum of \$6,396,898 was properly allowed as a deduction by the Commissioner of Internal Revenue.

12. That the court erred in holding, in its conclusion of law number 16, that the probate of the Will of Henry C. Folger, coupled with the waivers with respect to rights under Section 17 of the Decedent's Estate Law of New York, established once and for all the proportion of the estate going to charity.

13. That the court erred in holding, in its conclusion of law number 17, that the defendant's second affirmative defense is insufficient in law.

WHEREFORE, said defendant respectfully prays that said errors be corrected and that the judgment in favor of the plaintiff herein be reversed and complaint and action dismissed.

MICHAEL F. WALSH,
United States Attorney,
Eastern District of New York,
Attorney for Defendant.

Citation.

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will and
Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

L-6839

446

By the Honorable MORTIMER W. BYERS, United
States District Judge for the Eastern District
of New York, to Edward Jordan Dimock, as
Substituted Executor of the Last Will and
Testament of Henry C. Folger, deceased, and
as Executor of the Last Will and Testament
of Emily C. J. Folger, deceased, GREETING:

447

YOU ARE HEREBY CITED and admonished to be
and appear before the United States Circuit Court
of Appeals for the Second Circuit to be held at
the United States Court House in the Borough of
Manhattan, City and State of New York, within
thirty (30) days from the date hereof, pursuant
to an appeal filed in the office of the Clerk of the
United States District Court for the Eastern Dis-

Citation.

trict of New York, wherein Walter C. Corwin, Late Collector of Internal Revenue, First District of New York, is appellant and you are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Brooklyn, in the City of New York, in the Eastern District of New York, and the Circuit above named, this 1st day of June, in the year of our Lord, one thousand nine hundred and thirty-eight, and of the independence of the United States the one hundred and sixty-second.

MORTIMER W. BYERS,
United States District Judge.

Stipulation and Order Settling Record.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

452

IT IS HEREBY STIPULATED AND AGREED that the
foregoing is a true copy of the transcript of the
record of the District Court in the above entitled
matter, as agreed upon by the parties.

453

Dated, New York, N. Y., June / 3 , 1938.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Plaintiff-Appellant.

MICHAEL F. WALSH,
Attorney for Defendant-Appellant,

By VINE H. SMITH,
Asst. U. S. Attorney.

454

Stipulation and Order Settling Record.

On reading the foregoing consent of the attorneys for the respective parties herein, it is

ORDERED, that the foregoing printed record be filed in lieu of the original appeal papers for the purpose of certifying a record on appeal.

Dated, Brooklyn, N. Y., June / 4 *th* , 1938.

MORTIMER W. BYERS,
U. S. D. J.

455

456

Clerk's Certificate.

457

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

EDWARD JORDAN DIMOCK, as Sub-
stituted Executor of the Last
Will and Testament of HENRY
C. FOLGER, deceased, and as
Executor of the Last Will
and Testament of EMILY C. J.
FOLGER, deceased,

Plaintiff,

against

WALTER C. CORWIN, Late Collec-
tor of Internal Revenue, First
District of New York,
Defendant.

No. L-6839

458

I, PERCY G. B. GILKES, Clerk of the District
Court of the United States of America for the
Eastern District of New York, do hereby certify
that the foregoing is a correct copy of the printed
transcript of the record of the said District Court
in the above entitled matter, as agreed on by the
parties and ordered filed by the Court.

459

IN TESTIMONY WHEREOF, I have caused the
seal of the said court to be hereunto affixed at the
City of New York in the Eastern District of New
York, this / 4 ~~th~~ day of June, in the year of our
Lord One thousand nine hundred and thirty-eight
and of the Independence of the United States the
One hundred and sixty-second year.

PERCY G. B. GILKES,

Clerk.

SEAL

By

J. R. Laver
J. R. Laver



UNITED STATES CIRCUIT COURT OF APPEALS

460

FOR THE SECOND CIRCUIT.

EDWARD JORDAN DIMOCK, as Substituted
Executor of the Last Will and Testament of
Henry C. Folger, deceased, and as Executor of
the Last Will and Testament of Emily C. J.
Folger, deceased,

Plaintiff-Appellant,

against

WALTER C. CORWIN, late Collector of Internal
Revenue, First District of New York,
Defendant-Appellee.

WALTER C. CORWIN, late Collector of Internal
Revenue, First District of New York,
Defendant-Appellant,

against

EDWARD JORDAN DIMOCK, as Substituted
Executor of the Last Will and Testament of
Henry C. Folger, deceased, and as Executor of
the Last Will and Testament of Emily C. J.
Folger, deceased,

Plaintiff-Appellee.

461

Before: MANTON, A. N. HAND and CHASE,
Circuit Judges.

Cross appeals from the District Court for the
Eastern District of New York. Action to recover
federal estate taxes paid under protest. Decree
for defendant; plaintiff and defendant appeal.
Affirmed.

462

Michael F. Walsh, United States Attorney for
the Eastern District of New York, Attor-
ney for Collector.

James W. Morris, Asst. Attorney General.

Sewall Key, Clarence D. Dawson, J. L. Mon-
arch, Special Assistants to the Attorney
General.

Vine H. Smith, Asst. U. S. Attorney, of Coun-
sel.

463

Opinion.

Hawkins, Delafield & Longfellow, Attorneys
for Plaintiff.

E. J. Dimock, C. O. Donahue, J. D. Rawlings,
of Counsel.

MANTON, Circuit Judge.

464 This action was commenced by the widow of Henry C. Folger who was the executrix of his estate. He died June 11, 1930 and she died February 21, 1936. The present appellant is executor of her estate and substituted executor of the estate of Henry C. Folger, and now maintains this action to recover federal estate taxes paid under protest.

On the plaintiff's appeal, the question presented is whether there should be included in the gross estate, (1) the whole value of the property held in joint tenancy instead of but one-half; (2) stocks contributed by the survivor of the joint tenancy. On the defendant's appeal, there is raised the sufficiency of the defense as to the claim of exemption from federal estate tax of the excess over one-half of the estate of the decedent which went to charity.

465 Before May 29, 1912, Folger gave to his wife 251 shares, and prior to March 10, 1914, 656½ shares of stock of different oil corporations. These shares were registered in her name on the books of each corporation. On February 9, 1916, she transferred into their joint name 250 shares of the first 251 shares of stock. She later transferred into their joint names one-half of the 656½ shares of stock and, on February 24, 1916, she transferred the remainder of these shares to their joint names. At the time of his death, the stock in their

Opinion.

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joint names was valued at \$846,772.15.

On April 17, 1914, Mr. Folger had begun establishing joint accounts in the stocks of various oil companies which he did either by transferring shares to the joint names of himself and his wife, or by purchasing shares which he directed to be registered in their names. By September 9, 1916, the effective date of the first federal estate tax act (39 Stat. 756), shares of stock had been placed in their joint names (including the shares contributed by Mrs. Folger as referred to) which had a value as of the date of his death of \$3,607,019.19.

467

The Commissioner of Internal Revenue determined that, for the purpose of assessment, the federal estate tax of Mr. Folger should include this sum of \$3,607,019.19 instead, as claimed by the plaintiff, a deduction of the sum of \$1,803,509.59 representing the value of one-half of the shares held in joint tenancy. It is contended that, at least the \$846,772.15 representing the value of the shares contributed by Mrs. Folger should be deducted. The tax was paid and a refund refused.

468

Section 302(e) of the Revenue Act of 1926 (ch. 27, 44 Stat. 9) which was in effect in June 1930, when Folger died, provides that there shall be included in the gross estate of the decedent, the value of all property to the extent of the interest therein held as joint tenants by the decedent and any other person, except such part thereof as may be shown to have originally belonged to such other person, and never to have been received or acquired by the latter from the decedent for less than an adequate or full consideration in money or money's worth. This

Opinion.

469

joint tenancy was created in September, 1916, and no consideration in money or money's worth was paid by Folger's wife for any of the stock in such joint tenancy.

470

Plaintiff argues that this statute would be unconstitutional if applied to tax the entire estate. A statute may be retroactive and valid if it deals with transactions closed after, but initiated before, its enactment. In the instant case, Congress intended to make taxable all transfers made before or after the enactment effective when the transfer took place. The argument of the plaintiff is that the statute is in contravention of the Fifth Amendment in that it taxes an interest of the survivor of the tenancy vested before the statute was passed.

471

Knox v. McElligott (258 U. S. 546) involved a joint estate created in 1912 and the question was whether the whole value should be included in the gross estate of a decedent who died while the 1916 act was in effect. The 1916 Act differed from §302(h) of the Revenue Act of 1926 in that the latter declared it the purpose of Congress to reach all joint estates, including those created before the statute. In the Knox case, the tax was resisted upon the grounds (a) that Congress did not intend to apply the statute to joint estates created before the enactment, and (b) that the statute was void if it reached the survivor's half of the joint estate. The Supreme Court decided that Congress did not intend that the statute should apply to joint estates created before its enactment. There was, therefore, no occasion to consider whether any event which occurred at death would have justified the tax if Congress

Opinion.

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had attempted to reach the entire joint estate. As to this decision so limited, see *Griswold v. Commr.* (290 U. S. 56) and *Cahn v. United States* (297 U. S. 691). *Tyler v. United States* (281 U. S. 497) involved an estate by the entirety. Upon the death of the husband, who had initiated during his life-time a transaction which resulted after his death in the surviving spouse owning free and clear the whole property, the court held that while there was not a transfer in the strict sense of the word, it was nevertheless true that the decedent's death "brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result." A tax on the whole value of the estate by the entirety was sustained. The same reasoning we think applies to joint estates where the purpose to tax joint estates, irrespective of the time of their creation, had been made clear. The Supreme Court has not doubted the power of Congress to reach by taxation the entire estate. *Gwinn v. Commr.*, 287 U. S. 224; *Foster v. Commr.*, 303 U. S. 618. If an event occurs at death which justifies a tax upon the whole value of the joint estate created after the statute, the same event will justify a tax upon the whole value of a joint estate created before the statute. Section 302(h) of the 1926 Act clearly indicates such a Congressional purpose to tax the whole value in every instance. Since the *Tyler* case, the Supreme Court has been consistent in so ruling. *Foster v. Commr.*, *supra*; *Gwinn v. Commr.*, *supra*. Congress has such power to legislate and require the inclusion of the whole value because the death of a joint tenant results in

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Opinion.

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such a shifting of economic benefits in the entire property as to make appropriate a tax on that result measured by the value of the entire property. Therefore, it is not material that the joint tenancy was created prior to the first federal estate tax of 1916. *Tyler v. Commr.*, *supra*; *Helvering v. Bowers*, 303 U. S. 618.

476

Joint tenancies at common law and tenancies by the entirety have one marked similarity—it is the incident of the right of survivorship. Such right is the immediate consequence of the peculiar mode in which joint tenants are seized, that is, of the whole jointly but of nothing separately. The difference between the two classes of tenancies is the right which exists in a joint tenant, and not in a tenant by the entirety, to sever the tenancy by his sole act as an inter vivos transaction, and thus destroy the right of survivorship. Unless a joint tenancy be severed during the lives of the joint tenants, the right of survivorship persists, and upon the death of one of the joint tenants, the survivor takes the whole estate. Neither joint tenant can dispose of any interest in the property by will and defeat the right of survivorship of the whole. The distinction between these tenancies is deemed unimportant in the application of a taxing statute. *Commr. v. Emory*, 62 Fed. 2, 591; *O'Shaughnessy v. Commr.*, 60 Fed. 2, 235.

477

In the instant case, before the death of the decedent, the surviving tenant had the right to possess and use the whole property. So too did her husband. Upon the death of the decedent and because of it, Mrs. Folger became entitled to the exclusive possession, use and

Opinion.

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enjoyment of the whole property and entitled to hold it as her own. Then she acquired the power of disposing of the property by will. Until the death of her husband, the complete ownership had not passed as to any part of the property. It therefore, was neither arbitrary nor capricious to include the entire value of the property in the decedent's estate and there was no constitutional objection. *Tyler v. Commr.*, *supra*; *Helvering v. Bowers*, *supra*; *Foster v. Commr.*, *supra*; *Sheets v. Commr.*, 95 Fed. 2, 727. As stated in the *Tyler* case, §302(e) of the 1926 Act, was enacted to prevent an avoidance of an estate tax. It was a part of the general scheme of taxation.

479

Plaintiff argues that §302(e) which "excepts such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth" prevents including the value of the property which belonged to Mrs. Folger just before the creation of the joint estate. If the acquisition was for less than an adequate and full consideration in money or money's worth occurred before the enactment of the first federal estate tax act, it must be included. Congress has placed this tax on all joint estates because they accomplish the result of transferring the decedent's property to the surviving spouse. But Congress has excluded any portion of the property which does not represent such a transfer. Upon the husband's death, every part of the joint estate which first belonged to him becomes the sole property of the widow and the test for determining the property excluded is whether it ever

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Opinion.

belonged to the decedent. If it did and was parted with for less than an adequate consideration, it is not to be excluded. Congress has provided that all such transactions be included without causing an inquiry in each case, whether the particular gift was designedly made to evade the tax.

482

Mr. Folger devised and bequeathed legacies to his sisters, brothers, nephews and nieces and the remainder in trust for the erection and maintenance of the Folger Shakespeare Memorial Library at Washington and for the payment of specific sums to his wife, his brother and sisters, his wife's brothers, his nieces and nephews and his wife's nieces and nephews during their lives. Upon the death of Mr. Folger, all persons who under the intestate laws of New York would be entitled to a share in his estate, executed written waivers of any objection to his will which they may have had under §17 of the Decedent's Estate Law of New York (Cons. Laws, ch. 13, art. 2417). These waivers were dated ten days after Mr. Folger's death and were embodied in waivers of the issue and service of citations upon the probate of his will. The gross estate was appraised at \$15,359.827.69 and after deductions of \$10,468,108.70 there was a fixed net estate of \$4,891,646.99. Included in these deductions was the sum of \$6,396.898 on account of decedent's bequests to charity. Defendant contends that the Commissioner erred in allowing as a deduction so much of the amount bequeathed to charity as exceeded one-half of the decedent's gross estate less his debts and that since the tax on such amount exceeds the tax sought to be recovered, the plaintiff cannot succeed.

483

The argument is that the gifts to charity in excess of one-half of the gross estate less the debts may not be allowed as a deduction under §303(a)(3) of the Revenue Act of 1926 (44 Stat. 9) because the charity takes such excess through the charitable intent of the widow and the gift is therefore in effect one from the widow and not from the decedent; also that gifts to the extent of such excess may not be allowed as a deduction under §303(a)(3) because the amount of such gifts cannot be ascertained as of the date of the decedent's death. 485

It is agreed that the bequests were charitable within §303(a)(3). Therefore to warrant the deduction allowed by statute, it is sufficient to show that the charity took the gift by bequest, legacy, devise or transfer from the decedent. In *re DeLamar*, 203 A. D. 638, *affd.* 236 N. Y. 604. The excess did not pass to Mrs. Folger and it is not explained how the gift could be from the widow without this having taken place. In *Humphrey v. Millard* (79 Fed. 2, 107, 108) where the government sought to tax the excess of a gift to charity over one-half of the decedent's estate where the widow had waived her rights under §17 of the decedent's estate law, we said that "until and unless the widow exercised her statutory right to defeat partially the tax-exempt testamentary disposition of the residuary estate which her husband had made, his will was effective as to all of it. This right was in the nature of a power which could be renounced. Her waiver of it was unnecessary to make the will valid." We held that the will having been probated, it was valid and disposed of the residuary estate as of the date of the death of the 486

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Opinion.

decedent in a manner exempt from federal estate taxation under §43(2)(3) of the Revenue Act of 1921. See: *Mead v. Welch*, 95 Fed. 617. The gift to charity in excess of one-half the estate was valid. It did not pass to Mrs. Folger but passed under Mr. Folger's will to the charity named therein and therefore falls within the terms of §303(a)(3) and was properly allowed as a deduction. Here the estate which had vested in charity was not divested at all but simply was more firmly vested in charity by the waivers of the widow and next of kin.

Decree affirmed.

489

UNITED STATES CIRCUIT COURT
OF APPEALS,
SECOND CIRCUIT.

490

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of November, one thousand nine hundred and thirty-eight.

Present: HON. MARTIN T. MANTON,
HON. AUGUSTUS N. HAND,
HON. HARRIE B. CHASE,

Circuit Judges.

491

EDWARD JORDAN DIMOCK, as substituted executor, etc.,
Plaintiff-Appellant.

vs.

WALTER C. CORWIN, late Collector, etc.,
Defendant-Appellant.

Appeal from the District Court of the United States for the Eastern District of New York.

492

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with interest.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

WM. PARKIN,
Clerk.

493

UNITED STATES CIRCUIT COURT,
OF APPEALS,
SECOND CIRCUIT.

EDWARD JORDAN DIMOCK, ETC.,

494

vs.

WALTER C. CORWIN, ETC.

ORDER FOR MANDATE

495

United States Circuit Court of Appeals
Second Circuit
Filed Nov. 17, 1938
William Parkin, Clerk.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 165, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

497

Edward Jordan Dimock, as substituted
executor, etc.,
Plaintiff-Appellant,
against

Walter C. Corwin, late Collector, etc.,
Defendant-Appellant.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this seventeenth day of November, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the said United States the one hundred and sixty-third.

498

SEAL

WM. PARKIN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 3, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following the hearing of No. 391.


And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone took no part in the consideration and decision of this application.

(9383)



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IN THE
Supreme Court
OF THE UNITED STATES

OCTOBER TERM, 1938

No. .

EDWARD JORDAN DIMOCK, as Substituted
Executor of the Last Will and Testa-
ment of Henry C. Folger, Deceased,
and as Executor of the Last Will
and Testament of Emily C. J. Fol-
ger, Deceased,

Petitioner,

against

WALTER C. CORWIN, late Collector of
Internal Revenue, First District of
New York,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Edward Jordan Dimock, as Substituted Executor of the Last Will and Testament of Henry C. Folger, deceased, and as Executor of the Last Will and Testament of Emily C. J. Folger, deceased, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on November 17, 1938.

Opinion Below

The opinion of the District Court for the Eastern District of New York is reported in 19 Fed. Supp. 56. The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet reported (R. 154-163).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 17, 1938 (R. 164). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented

The questions presented by this petition are two:

1. Whether the Federal Estate Tax Act of 1926 (Revenue Act of 1926, 44 Stat. 69) is not unconstitutional in purporting to include in the gross estate the survivor's half interest in jointly held property (in addition to including the decedent's half interest) where the joint tenancy was created prior to any federal estate tax act.

2. Whether the Act mentioned does not in terms exempt from inclusion in the gross estate property contributed by the survivor to a joint tenancy, even though such property was first given by the decedent to the survivor, where the gift by the decedent and the contribution by the survivor took place prior to any federal estate tax act.

An additional question was presented below, *i. e.*, whether the amount bequeathed by the decedent to The Trustees of Amherst College to found the Folger Shake-

speare Library in Washington was not in substance, under the New York law, a gift to the next-of-kin and by them to the charity, rather than a gift by the decedent to charity, insofar as it exceeded one-half of the decedent's estate, and therefore as to such excess subject to federal estate tax. That question was decided by the courts below in favor of the petitioner and therefore is not presented by this petition.

Statutes and Regulations Involved

The statutes and regulations involved are set out in the Appendix A *infra*, pages 10-12.

Statement

The facts were stipulated (R. 43-50, inc.) except that brief testimony was introduced by petitioner (R. 38-41, inc.). The facts were found as stipulated and testified to (R. 74-96, inc.) They may be summarized as follows:

On June 11, 1930, Henry C. Folger died a resident of New York leaving him surviving his wife, Emily C. J. Folger (R. 74). Mr. Folger was a New York lawyer who had been chairman of the board of directors of the Standard Oil Company of New York (R. 74, 76).

At the time of his death, Mr. Folger, together with Mrs. Folger, owned, as joint tenants, shares of the stocks of fifteen Standard Oil companies (R. 86, 87). The joint accounts in all of these stocks were created prior to September 9, 1916, the effective date of the first federal estate tax act (R. 87, 88).

Back in 1912, Mr. Folger began making to Mrs. Folger absolute gifts of varying amounts of stock in the Standard Oil Companies. Prior to May 29, 1912, he gave her 251 shares of the capital stock of the Standard Oil Company of New York, and prior to March 10, 1914, he gave

her 656½ shares of the capital stock of the Standard Oil Company (California) (R. 90). The shares of both of these companies were registered in her individual name on the corporate books.

In 1914, Mr. Folger began establishing joint accounts with Mrs. Folger in the stocks of the Standard Oil Companies, registering the stocks in their joint names (R. 86, 87). Mrs. Folger, too, transferred into these accounts in their joint names some of the shares which Mr. Folger had given her outright one or more years before. She transferred 250 of the 251 shares of stock of the Standard Oil Company of New York into their joint names on February 9, 1916, about four years after the gift to her (R. 90). On February 9, 1915, about a year after the gift of the shares of the Standard Oil Company (California), she transferred into a joint account ½ share of the 656½ shares of the stock of that company, and on February 24, 1916, about two years after the gift, she transferred into the joint names the remaining 656 shares (R. 91).

The shares so transferred by Mrs. Folger to the joint names had a value as of the death of Mr. Folger of \$846,772.15 (R. 90, 91), and those transferred by Mr. Folger, \$2,760,247.04, making a total death value of the shares transferred by both of \$3,607,019.19 (R. 89). All of these transfers to the joint accounts were made prior to September 9, 1916, the effective date of the first federal estate tax act (39 Stat. 756) (R. 90, 91).

The estate returned one-half of the value of these jointly held stocks for taxation on the theory that Congress could not constitutionally levy an estate tax upon the survivor's half interest. The Commissioner of Internal Revenue assessed the entire joint estate without even deducting the value of the shares contributed by Mrs. Folger (R. 92, 93).

The Collector of Internal Revenue demanded an additional tax based in part upon the inclusion of the full

value of the joint property in the gross estate. The estate paid the tax, applied for the refund thereof, and, upon its denial, brought this suit for its recovery (R. 94).

The District Court found as conclusions of law that the Commissioner (a) properly determined that the full value of the stocks, held in the joint accounts should be included in the gross and net estates of the decedent for estate tax purposes, and (b) properly determined that no part of the value of the joint accounts representing property transferred thereto by Mrs. Folger should be excluded from the gross and net estates (R. 98, 99). The taxpayer excepted (R. 104) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 136, 137, 140). The latter affirmed the judgment of the District Court (R. 164).

Specification of Errors to be Urged

The court below erred in holding:

1. That the Commissioner of Internal Revenue properly included in the decedent's gross and net estates for estate tax purposes the full value of the stocks held in the joint accounts.

2. That the Commissioner of Internal Revenue properly included in the decedent's gross and net estates the individual property of Mrs. Folger transferred to the joint accounts by her.

3. That Section 302, subdivisions (e) and (h), of the Revenue Act of 1926, as applied in the circumstances of this case, is valid under the due process clause of the Fifth Amendment of the Constitution of the United States.

4. That the judgment of the District Court should be affirmed.

Reasons for Granting the Writ

I.

The determination of the Circuit Court of Appeals for the Second Circuit in this case, that the survivor's half as well as the decedent's half of property held in joint tenancy may be subjected to federal estate tax even though the tenancy was created prior to any federal estate tax act, is squarely opposed to the determination made by the Circuit Court of Appeals for the Seventh Circuit on June 28, 1938, in *Jacobs v. United States* (97 F. 2d 784). The Second Circuit held in the case at bar that Section 302, subdivisions (e) and (h) of the Revenue Act of 1926, requiring the inclusion in the decedent's gross and net estates of the full value of property held in a joint tenancy created prior to the first federal estate tax act, is constitutional, while the Seventh Circuit held in the *Jacobs* case that the same section of the Revenue Act of 1924* is unconstitutional insofar as applied to the survivor's half interest. Beside the cases which the court in the *Jacobs* case cites in support of its conclusion, we refer this Court to *Griswold v. Helvering*, 290 U. S. 56, 58 (1933) for a recognition of the practical half interests which two joint tenants hold in the property subject to the tenancy. In view of this conflict between Circuits and of the cogency of the arguments in support of the conclusion reached in the *Jacobs* case, it is submitted that this Court should grant certiorari to review this case.

Certiorari has already been granted in the *Jacobs* case (November 7, 1938) and it is No. 391 for the October Term, 1938. Petitioner believes that, if certiorari is granted herein, this case can be prepared in sufficient time to permit its being heard at the same time as the *Jacobs* case is heard.

*The 1926 and 1924 Acts are substantially identical in this respect. See Appendix, pages 10 and 11.

II.

The second point in this case is not raised by the *Cobbs* case. That point is that the individual property Mrs. Folger acquired by her absolutely from Mr. Folger from two to four years before the passage of any federal estate tax act, and which she transferred to the joint names of herself and her husband prior to any federal estate tax act, should not properly be included in Mr. Folger's gross and net estates. This question, involving property valued at \$846,772.15, the tax upon which petitioner computes at \$26,298.45 (R. 103), apparently is raised for the first time in any court in this case. It is our position that even if Congress could constitutionally have subjected the entire joint estate to federal estate tax, the statute, properly construed, exempts the contributions made by the survivor, Mrs. Folger.

The exemption on which we rely is that part of Section 2 (e) of the Revenue Act of 1926 (44 Stat. 71) which reads:

"* * * except such part thereof as may be shown to have originally belonged to (the survivor) and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth."

Congress thus expressly exempted from taxation so much of the property held in joint tenancy as may be shown to have originally belonged to the survivor and never to have been received from the decedent for less than a fair consideration. There is thus an exemption in favor of contributions by the survivor and a limitation on the exemption to contributions of property which were never received from the decedent. The question is whether this limitation is prospective only or whether it is retroactive back beyond the date when it was written into the act. If it is prospective only, it should be read as exempting all contributions by the survivor which were never received from the decedent "after the passage of this act" "received from the decedent", and Mrs. Folger's contributions are exempt be-

cause they were received from the decedent prior to the passage of the act. If, on the other hand, the limitation on the exemption is retroactive, then Mrs. Folger's contributions are taxable because they were *at some time* received from the decedent.

This court has been loath to construe the federal estate tax act as retroactive. In *Shwab v. Doyle*, 258 U. S. 529 (1922), the statute taxed gifts in contemplation of death made *at any time*, but this court (p. 536) construed that expression to mean *at any time* "after the passage of this act." (See also *Hassett v. Welch*, 303 U. S. 303, 308 [1938].)

The word "never" is but the negative of the words "at any time", which were construed in the *Shwab* case as prospective only. (Webster's New International Dictionary, Second Edition, 1937.) There is thus no obstacle to construing the word "never" in the statute under consideration as meaning "not at any time after the passage of this act" if the rest of the statute indicates that that was the intent of Congress.

Examining that intent we find that the reason for exempting contributions by the survivor is clear. Congress wished to tax only those transfers where the ultimate effect was a transfer from one joint tenant to the other. If a wife contributed 100% of the joint property and the husband died, Congress wanted to exempt the transfer of what had been the wife's own property back to herself. That was the reason for exempting contributions of the survivor. If, however, Congress stopped there, it would have invited tax evasion. The husband might have wished to give his property to his wife upon his death and to avoid any tax upon it. He could give it to her on one day and on the next have her give it to the joint estate. Then, on his death, there would have been in substance a transfer from him to his wife, but it would have been exempt because the property would have technically been contributed to the joint tenancy by the wife. It is admitted on all hands (*e. g.*, opinion below, R. 160), that it was in order to avoid this evasion that the limitation on the

exemption was inserted in the statute. That purpose is fully carried out by a prospective interpretation. There was no reason for making the limitation retroactive and excluding from the benefit of the exemption property which the decedent had given to the contributor before there was any federal estate tax act to be evaded. Since there is no reason for construing the limitation as retroactive and there is room for construing it as either retroactive or prospective, it should be construed as prospective only and the contributions made by Mrs. Folger from gifts made by Mr. Folger to her before any federal estate tax act should be exempted from tax.

The purposes of the act will be fully served and evasion will still be impossible if the limitation upon the exemption be construed as prospective only. Injustice results from the construction made by the court below. We submit that this Court should review the determination of the court below and construe the statute in accordance with the principles pronounced in *Lewellyn v. Frick*, 268 U. S. 238 (1925), where Mr. Justice HOLMES, after stating that acts of Congress are to be construed so as to avoid doubt as to their constitutionality, said at page 251 (italics ours):

"Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose *before* their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

Conclusion

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

E. J. DIMOCK,
Counsel for Petitioner.

November 21, 1938.

Appendix A

*Revenue Act of 1924, Section 302.**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

.

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: PROVIDED, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: PROVIDED FURTHER, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

.

"(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

*Involved in *Jacobs v. United States*, 97 F. 2d 784.

*Appendix A.**Revenue Act of 1926, Section 302:**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

.

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: PROVIDED, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: PROVIDED, FURTHER, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenant by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so required by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

.

"(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

*Involved in case at bar.

Appendix A.

*Regulations 70, Art. 22:**

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY.
 —The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for the purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common."

Regulations 80, Art. 22:†

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY.
 —The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 302(e), as amended, applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

*In force on June 11, 1930, the date of the death of the testator, and until July 3, 1930.

†Presently in force.

No. 482

FILED

JAN 11 1939

CHARLES ELMORE DROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, Deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, Deceased,

Petitioner,

against

WALTER C. CORWIN, late Collector of Internal Revenue,
First District of New York.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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No. 482.

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1938.

EDWARD JORDAN DIMOCK, as Substituted Executor of the
Last Will and Testament of **HENRY C. FOLGER**, De-
ceased, and as Executor of the Last Will and Testament
of **EMILY C. J. FOLGER**, Deceased,

Petitioner,

against

WALTER C. CORWIN, late Collector of Internal Revenue,
First District of New York.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the District Court (R. 112, 129) is re-
ported in 19 Fed. Supp. 56. The opinion of the Circuit
Court of Appeals (R. 154-163) is reported in 99 F. 2d 799.

Jurisdiction.

The judgment of the Circuit Court of Appeals was en-
tered on November 17, 1938 (R. 164). The petition for
certiorari was filed on November 22, 1938, and *certiorari*

was granted on January 3, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

The questions presented by this writ arise under Section 302 of the Federal Estate Tax Act of 1926 (44 Stat. 70), the essential provisions of which are as follows:

“Section 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

.

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, . . . except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth”

The questions presented are:

1. Whether the Federal Estate Tax Act of 1926 (Revenue Act of 1926, 44 Stat. 71) is not unconstitutional in purporting to include in the gross estate the survivor's half interest in jointly held property (in addition to including the decedent's half interest) where the joint tenancy was created prior to any federal estate tax act.

2. Whether the Act mentioned does not in terms exempt from inclusion in the gross estate property contributed by the survivor to a joint tenancy, even though such property was first given by the decedent to the survivor, where the gift by the decedent and the contribution by the survivor took place prior to any federal estate tax act.

Statutes and Regulations Involved.

The statutes and regulations involved are set out in the Appendix A, *infra*, pp. 35-38.

Statement.

The facts were stipulated (R. 43-50, inc.) except that brief testimony was introduced by petitioner (R. 38-41, inc.). The findings adopt the stipulation and testimony. They may be summarized as follows:

On June 11, 1930, Henry C. Folger died a resident of New York leaving him surviving his wife, Emily C. J. Folger (R. 74). Mr. Folger was a New York lawyer who had been chairman of the board of directors of the Standard Oil Company of New York (R. 74, 76).

At the time of his death, Mr. Folger, together with Mrs. Folger, owned, as joint tenants, shares of the stocks of fifteen Standard Oil companies (R. 86, 87). The joint accounts in all of these stocks were created prior to September 9, 1916, the effective date of the first federal estate tax act (R. 87, 88).

Back in 1912, Mr. Folger had begun making to Mrs. Folger absolute gifts of varying amounts of stock in the Standard Oil Companies. Prior to May 29, 1912, he gave her 251 shares of the capital stock of the Standard Oil Company of New York, and prior to March 10, 1914, he gave her 656½ shares of the capital stock of the Standard Oil Company (California) (R. 90). The shares of both of these companies were registered in her individual name on the corporate books (R. 90).

In 1914, Mr. Folger began establishing joint accounts with Mrs. Folger in the stocks of the Standard Oil Companies, registering the stocks in their joint names (R. 86, 87). Mrs. Folger, too, transferred into these accounts in their joint names some of the shares which Mr. Folger had

given her outright one or more years before. She transferred 250 of the 251 shares of stock of the Standard Oil Company of New York into their joint names on February 9, 1916, about four years after the gift to her (R. 90). On February 9, 1915, about a year after the gift of the shares of the Standard Oil Company (California), she transferred into a joint account $\frac{1}{2}$ share of the 656 $\frac{1}{2}$ shares of the stock of that company, and on February 24, 1916, about two years after the gift, she transferred into the joint names the remaining 656 shares (R. 91).

As of the date of the death of Mr. Folger, the shares so transferred by Mrs. Folger to the joint names had a value of \$846,772.15 (R. 90, 91), and those transferred by Mr. Folger, \$2,760,247.04, making the total death value of the shares transferred by both, \$3,607,019.19 (R. 89). All of these transfers to joint accounts were made prior to September 9, 1916, the effective date of the first federal estate tax act (39 Stat. 756) (R. 90, 91).

The estate returned only one-half of the value of these jointly held stocks for taxation on the theory that Congress could not constitutionally levy an estate tax upon the survivor's half interest. The Commissioner of Internal Revenue assessed the entire joint estate without even deducting the value of the shares contributed by Mrs. Folger (R. 92, 93).

The Collector of Internal Revenue demanded an additional tax based in part upon the inclusion of the full value of the joint property in the gross estate. The estate paid the tax, applied for the refund thereof, and, upon its denial, brought this suit for its recovery (R. 94).

The District Court found as conclusions of law that the Commissioner (a) properly determined that the full value of the stocks held in the joint accounts should be included in the gross and net estates of the decedent for estate tax purposes, and (b) properly determined that no part of the value of the joint accounts representing property transferred thereto by Mrs. Folger should be excluded from the gross and net estates (R. 98, 99). The taxpayer excepted.

R. 104) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 136, 137, 140). The latter affirmed the judgment of the District Court (R. 164).

The taxpayer computes the tax which should be repaid because assessed upon Mrs. Folger's half of the joint property at \$52,877.33, and the tax which should be repaid because assessed upon Mrs. Folger's contributions at \$6,298.45 (R. 103). Since the first of these sums includes the second, the maximum possible recovery is \$52,877.33, and success of the taxpayer upon the first point will eliminate the necessity for consideration of the second.

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the Commissioner of Internal Revenue properly included in the decedent's gross and net estates for estate tax purposes the full value of the stocks held in the joint accounts.
2. That the Commissioner of Internal Revenue properly included in the decedent's gross and net estates the individual property of Mrs. Folger transferred to the joint accounts by her.
3. That Section 302, subdivisions (e) and (h), of the Revenue Act of 1926, as applied in the circumstances of this case, are valid under the due process clause of the Fifth Amendment of the Constitution of the United States.
4. That the judgment of the District Court should be affirmed.

Summary of Argument.

As to Point I—Mrs. Folger's Half Interest.

While this Court has held that Congress can constitutionally tax the decedent's half of a joint tenancy created prior to the incidence of any federal estate tax act (*Gwinn v. Commissioner*, 287 U. S. 244 (1932)), it has never passed upon the power of Congress to tax the survivor's half. The Circuit Court of Appeals for the Second Circuit in the case at bar ruled in favor of the power to lay such a tax, and the Circuit Court of Appeals for the Seventh Circuit in *United States v. Jacobs*, 97 F. 2d 784 (1938), ruled to the contrary.

This Court has, however, said that a statute laying such a tax would be a retroactive act affecting a closed transaction, and that the intention of Congress to avoid doing such a thing would be presumed unless the language used compelled a contrary conclusion. (*Knox v. McElligott*, 258 U. S. 546 (1922) followed in *Cahn v. United States*, 297 U. S. 691 (1936)). This Court therefore held in *Knox v. McElligott* that the first federal estate tax act did not reach the survivor's interest in a preexisting joint tenancy and held in a companion case (*Union Trust Company v. Wardell*, 258 U. S. 537 (1922)), that it did not reach a preexisting interest of a trust beneficiary.

Congress has since these companion decisions changed its language so that the retroactive purpose is unmistakable.

The cases now before this Court are the first to test this attempt of Congress at retroactive taxation in so far as it applies to the preexisting interest of a surviving joint tenant, but in so far as it applies to preexisting trust estates it has been tested and has failed. In *Nichols v. Coolidge*, 274 U. S. 531 (1927), *Helvering v. Helmholtz*, 296 U. S. 93 (1935) and *White v. Poor*, 296 U. S. 98 (1935), this Court held ineffective the attempt of Congress to tax trust estates created prior to the incidence of the federal estate tax act. The argument that a tax is levied on the occasion of the

ripening of further rights therein on the death of the settlor was of no avail.

Mrs. Folger's preexisting property right in this case is much more substantial than the preexisting property rights of the trust beneficiaries in the *Nichols*, *Helmholz* and *White* cases, in that before the passage of the federal estate tax act she had the power to sell a half interest in the joint property for exactly half the value of the whole. The only particular in which her interest was less substantial than that of the trust beneficiaries was that until the death of her co-tenant she ran the risk that she might lose her property right by being the first to die. The risk that she might lose this half interest by being the first to die did not reduce its value. The value of anything is what it can be sold for and her interest could at all times have been sold for half of the value of the whole. This Court in *Knox v. McElligott*, 258 U. S. 546, *supra*, and *Cahn v. United States*, 297 U. S. 691, *supra*, when it fixed the value of the surviving joint tenant's share which could not be reached by a non-retroactive act, fixed it at one-half of the value of the whole without any deduction for the risk of loss in the event of failure to survive the co-tenant.

The Court below and the Government seek to sustain this tax upon the whole property, when only half of it was transferred after the incidence of the federal estate tax act, by saying that under the classic definition of a joint tenancy each tenant owns the whole so that when one dies and the survivor receives his interest, the survivor receives the whole. The argument if good would work just as well the other way, i. e., that as the survivor always had the whole, he received nothing on the decedent's death. As a matter of fact, the argument was urged in just that way in favor of the taxpayer in *Tyler v. United States*, 281 U. S. 497 (1930) and *Gwinn v. Commissioner*, 287 U. S. 224, *supra*, and was rejected by this Court in both of those cases.

The *Tyler* case is of the utmost importance in the present controversy in view of the rule there laid down that these cases involving the constitutionality of taxes are to be deter-

mined on the basis of the practical effect of the taxes rather than upon the metaphysical conception of the common law estates involved.

In view of the nature of the tenancy by the entirety pointed out in the *Tyler* case, where the separate rights of each tenant are substantially zero, this Court in a *per curiam* opinion in *Third National Bank and Trust Co. v. White*, 287 U. S. 577 (1932), upheld the subjection to federal estate tax of the full value of property held in a tenancy by the entirety although the estate had been created prior to the incidence of the taxing act.

That decision does not militate against our contention that in the case of a joint tenancy created prior to the passage of the taxing act, Congress is limited to the taxation of the half which the survivor receives upon the death of the decedent. The surviving joint tenant at all times had a property right in one-half as opposed to the position of a tenant by the entirety whose rights are substantially nil until the estate is destroyed by the death of one spouse. Joint tenants hold *per tout et per my* while tenants by the entirety hold *per tout et non per my*.

The theoretical argument is pressed further and it is said that the decedent's interest is really an interest in the whole because it is an undivided interest. That, however, can be said with equal force with respect to the interest of a tenant in common, and the Government takes nothing by the argument for no one would urge that Congress had power to tax by a retroactive statute all the property held in a tenancy in common when one tenant died and bequeathed his share to his co-tenant.

Whatever may be the practical situation, the Government urges that the theoretical view has been adopted by this Court in *Foster v. Commissioner*, 303 U. S. 618 (1938), where the entire value of property held in a joint tenancy created after the federal estate tax act was held to be taxable. It required no metaphysics, however, for this Court to reach that result. The federal estate tax act with respect to rights vesting after its passage acts as an excise tax act

laying the tax upon the original vesting but postponing the assessment and payment until death.

The argument that Congress could levy the tax upon the permissible half but measure it upon the exempt half was answered in *Nichols v. Coolidge*, 274 U. S. 531, *supra*.

As to Point II—Mrs. Folger's Contributions.

The statute exempts so much of the joint property as is shown to have been contributed by the survivor "and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration * * *." Mrs. Folger contributed shares of a death value of over \$800,000. which she received or acquired from the decedent as gifts at various times from a year to four years prior to contributing them to the joint tenancy. Nevertheless we contend that since she received the shares before the incidence of any federal estate tax act, the statute properly construed entitles her to the exemption. This contention involves a non-retroactive construction of the statute as if it read "and never *after the passage of this act* to have been received or acquired * * * from the decedent * * *." The words "at any time" have been twice construed by this Court to mean "at any time *after the passage of this act.*" (*Shwab v. Doyle*, 258 U. S. 529, (*supra*); *Hassett v. Welch*, 303 U. S. 303, 308 (1938)).

The way is thus open for construing this limitation of the exemption as prospective if that is the intent of Congress.

The intent of Congress in limiting the exemption was to eliminate the tax evasion possible if a husband could, by giving his fortune to his wife and having her create a joint tenancy, split the income in halves but make sure that if he died first there would be no tax. As the reason for the limitation of the exemption is to prevent evasion of tax, it should not be construed so as to apply at a time when there was no tax to evade.

The Government argues that subdivision (h) of Section 302 of the federal estate tax act of 1926 (Revenue Act of

1926, 44 Stat. 71), which clearly expresses the intent of Congress to levy a retroactive tax, expresses also the intent of Congress to make the limitation of the exemption retroactive. Subdivision (h) enumerates the transactions and interests with respect to which the act is made retroactive, and the "receipt or acquisition" of the property by the contributor to a joint tenancy is not listed in that enumeration. As might be expected, subdivision (h) confines itself to making the tax retroactive without concerning itself with any retroactive effect of the limitation of the exemption.

ARGUMENT.

POINT I.

Emily C. J. Folger, the survivor, had a vested interest in the joint account prior to the passage of any federal estate tax act. This interest was in substance ownership of one-half of the stock. The Revenue Act of 1926 in so far as it purports to include the value of the survivor's interest in the joint property in the decedent's estate for tax purposes violates the Fifth Amendment of the Federal Constitution.

The statute involved is Section 302 (e) of the Revenue Act of 1926, quoted on page 36 of the Appendix. A reading of the Act shows that there is no doubt of the intention of Congress to tax the whole of joint estates and estates by the entirety even when created prior to the passage of the original federal estate tax act. There are certain exceptions based upon the source of the property which will become of importance in our second point but are immaterial here.

This Court has decided that Congress may constitutionally tax the following:

The whole of a tenancy by the entirety created after the incidence of the federal estate tax act. (*Tyler v. U. S.*, 281 U. S. 497, *supra*).

The whole of a tenancy by the entirety created prior to the incidence of the federal estate tax act. (*Third National Bank and Trust Co. v. White*, 287 U. S. 577, *supra*); *Helvering v. Bowers*, 303 U. S. 618 (1938)).

The whole of a joint tenancy created after the incidence of the federal estate tax act. (*Foster v. Commissioner*, 303 U. S. 618, *supra*).

Half of a joint tenancy created prior to the incidence of the federal estate tax act. (*Gwinn v. Commissioner*, 287 U. S. 224, *supra*).

The question whether Congress can constitutionally tax the other half of a joint tenancy created prior to the incidence of the federal estate tax act has never been before this Court. Congress was upheld in its attempt to exercise this power by the Circuit Court of Appeals for the Second Circuit in the case at bar. Congress was held to be without such power in *United States v. Jacobs*, 97 F. 2d 784, *supra*, No. 391, October, Term 1938, set for argument immediately preceding the case at bar.

While this Court has thus never held that it would be unconstitutional to exact an estate tax laid upon the whole of a joint tenancy created prior to the incidence of the taxing act, this Court has held in substance that to tax more than the decedent's half interest in such a case would be retroactive taxation of the closed transaction creating the survivor's half interest, and as such would not be deemed to be the intent of Congress in the absence of the clearest and most explicit statutory language. (*Knox v. McElligott*, 258 U. S. 546, *supra*; *Cahn v. U. S.*, 297 U. S. 691, *supra*).

Congress has, however, by amendment of the act (Section 302 (h) of the 1926 Revenue Act (44 Stat. 71), effective 1924, printed at page 37, *infra*), made its intention clear to tax such a transfer. The case at bar, and its companion, the *Jacobs* case, are the first cases to test the constitutionality of that intention in this Court.

In spite of the intention of Congress thus manifested, the Commissioner of Internal Revenue evidently doubted the

constitutionality of the position taken in 1924, and there was in force at the time of the death of the decedent herein on June 11, 1930, a regulation providing that not even one-half of a joint tenancy created prior to any federal estate tax act should be included in the gross estate (T. D. 4248, amending Article 22 of Regulations 68 and 70, Appendix, p. 37).*

Twenty-two days after the decedent died, however, this regulation was withdrawn (T. D. 4295, amending Article 22 of Regulations 70, 1929 Edition) and the Commissioner is attempting to include the value of the whole of the joint estate in the gross estate of the decedent.

The Commissioner is just as wrong in ruling that the whole of a joint estate created before the taxing act can be taxed as he was in ruling that none of it could be taxed. The survivor at the instant of the creation of the joint tenancy obtained a vested right in one-half of the property which could not be disturbed by subsequent legislation without offending the Fifth Amendment of the Constitution of the United States.

The fundamental distinction for estate tax purposes between the decedent's half of jointly held property and the survivor's half is well known in this Court. One of the four companion cases in which this Court in 1922 rejected the contention that the terms of the first federal estate tax act required that it be applied retroactively was *Knox v. McElligott*, 258 U. S. 546, *supra*, where the facts were exactly like those of the case at bar. A joint tenancy was created prior to the passage of any federal estate tax act. One of the joint tenants died after the passage of the first federal estate tax act. The act purported to tax the whole of all joint tenancies. The whole of the property was assessed by the Commissioner and the taxpayer brought an action to recover the tax on the survivor's half. He was successful in the District Court. The Circuit Court of Appeals reversed the District Court but this Court in turn reversed the Circuit Court of

* For a case where the Commissioner acted under this ruling, see *Tait v. Safe Deposit & Trust Co.*, 70 F. 2d 79 (4th Circuit, 1934).

Appeals, saying that to tax the survivor's half would be to give the statute a retroactive operation. However, instead of holding the statute unconstitutional, this Court merely held that Congress would not be deemed to have passed a retroactive statute unless the statute contained an express statement to that effect. Other cases which will be immediately referred to demonstrate the view of this Court that the creation of a joint tenancy before the incidence of any federal estate tax act is a completed transaction as far as the survivor's half is concerned.

This Court's views on that subject are well summed up in the short opinion of the Court by Mr. Justice Sutherland, in *Griswold v. Helvering*, 290 U. S. 56 (1933). There a joint tenancy was created before the incidence of any federal estate tax act and the decedent died before the act was made expressly retroactive. The Commissioner of Internal Revenue included the whole value of the joint property in the gross estate but the Board of Tax Appeals and the Circuit Court of Appeals reduced the share to one-half. In this Court the Government conceded in accordance with *Knox v. McElligott* that only a retroactive statute could reach the survivor's half and that the then federal estate tax act was not retroactive. The taxpayer, however, sought to escape taxation even with respect to the decedent's half. In disposing of that claim, Mr. Justice Sutherland gave the opinion which follows (except for the statement of facts) in full (p. 58):

"Whether this application of the statute gives it a retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax. By the judgment under review, only half of the value, that is to say, the value of decedent's interest, has been included, leaving the survivor's interest unaffected. After the creation of the joint tenancy, and until his death, decedent retained his interest in, and

control over, half of the property. Cessation of that interest and control at death presented the proper occasion for the imposition of a tax. See *Gwin v. Commissioner*, 287 U. S. 224, and cases cited. And since that is all that is sought to be reached by the tax here in question, the complaint that the statute has been given a retroactive application obviously is without substance. The statute as applied does not lay a tax in respect of an event already past, but in respect of one yet to happen.

"Petitioners insist that *Knox v. McElligott*, 258 U. S. 546, is to the contrary, but, clearly, it is not. There the tax return included the value of decedent's one-half of the jointly owned property, but did not include the value of the half which had been owned and enjoyed by the surviving joint tenant. Nevertheless, the commissioner undertook to impose a tax in respect of the value of this latter half as well. This court held that to do so was to apply the statute retroactively, and that this, under the circumstances of that case, could not be done. It did not hold, or intend to hold, that the statute was retroactive in so far as the value of the decedent's half of the joint estate was concerned. That question was not there involved. It is the only question here."

Knox v. McElligott, 258 U. S. 546, *supra*, was thus, as Justice Sutherland interpreted it, a case where the court held that to include the value of the half of jointly owned property which had been owned and enjoyed by the surviving joint tenant prior to the passage of the act would be to apply it *retroactively*.

The *Knox* case was decided by this Court on the authority of *Shwab v. Doyle*, 258 U. S. 529, (*supra*). In the *Shwab* case the decedent had made a transfer in trust in 1915, and then died in 1916, seven days after the passage of the first federal estate tax act. That act provided that a tax was to be imposed upon the transfer of the net estate of every decedent dying after the passage of the act—

"To the extent of any interest therein of which the decedent has at *any time* made a transfer, or with

respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * * ." (Revenue Act of 1916, Sec. 202(b) 39 Stat. 756, 777, italics ours.)

The Commissioner of Internal Revenue assessed a tax upon the transfer. The tax was paid and an action was brought to recover it. In the District Court the jury found that the transfer was one made in contemplation of death, and the District Court's judgment for the Government was affirmed by the Circuit Court of Appeals. This Court, however, reversed upon the ground that in spite of the language of the Act,* it would not be deemed to be retroactive. Mr. Justice McKenna, speaking for the Court, closed his opinion with these words (p. 536):

"We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of congress, and have resolved that it should be not construed to apply to *transactions completed* when the act became a law. And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916." (Italics ours.)

Since it was on the authority of the case of *Shwab v. Doyle* that this Court held in *Knox v. McElligott* that only one-half of jointly held property could be subjected to a

* For a similar non-retroactive construction of the words "at any time" in a federal estate tax act see *Hassett v. Welch*, 303 U. S. 303, 308, *supra*.

subsequently enacted federal estate tax act without a retroactive application of the statute, it is fair to say that this Court has treated the creation of the survivor's share of property in a joint tenancy established prior to the passage of any federal estate tax act as a "completed transaction."

Beside *Knox v. McElligott*, the other three of the companion cases where this Court refused to construe the old federal estate tax act as retroactive were *Shwab v. Doyle*, 258 U. S. 529, *supra*, involving a preexisting transfer in contemplation of death, *Union Trust Co. v. Wardell*, 258 U. S. 537, *supra*, involving a preexisting trust estate, and *Levy v. Wardell*, 258 U. S. 542 (1922), involving a preexisting conveyance with the reservation of a life estate.

Congress has since these companion decisions changed its language so that the retroactive purpose is unmistakable.

This case and its companion the *Jacobs** case now before this Court are the first to test this attempt of Congress at retroactive taxation in so far as it applies to the preexisting interest of a surviving joint tenant, but in so far as it applies to preexisting trust estates, it has been tested and has failed. The cases where this occurred are *Nichols v. Coolidge*, 274 U. S. 531, *supra*, *Helvering v. Helmholz*, 296 U. S. 93, *supra*, and *White v. Poor*, 296 U. S. 98, *supra*. It was these cases upon which the Circuit Court of Appeals for the Seventh Circuit in the *Jacobs* case based its conclusion of the unconstitutionality of the levy of an estate tax upon the survivor's interest in a joint tenancy created prior to the incidence of any federal estate tax act. These cases were not distinguished, and, in fact, not cited by the Circuit Court of Appeals for the Second Circuit in reaching the contrary decision in the case at bar.

In *Nichols v. Coolidge* the Court's reasons for holding the retroactive taxing act unconstitutional were (1) that it is beyond the power of Congress to impose an excise upon

* *Jacobs v. United States*, 97 F. 2d 784, *supra*, assigned for argument as No. 391 of October Term, 1938, immediately preceding the argument of the case at bar.

transfers made before the enactment of the excise law; (2) that to attempt to lay an excise upon the transfer of the decedent's property at death reckoned upon the value of the property which was transferred before the passage of the statute, is arbitrary and capricious and so violates the Fifth Amendment.

The facts in *Nichols v. Coolidge* were as follows: In 1907, Mrs. Coolidge and her husband transferred certain real estate and personal property (without consideration) to trustees who were to hold it and pay the income to the settlors and after their death to pay over the corpus to the settlors' children or their representatives. In April, 1917, the settlors assigned their interest in the trust property, including the right to receive the income from the trust, to the remaindermen, but the trustees continued to hold the property. Mrs. Coolidge died in January, 1921. The Commissioner of Internal Revenue held that, under Section 402(c) of the Revenue Act approved February 24, 1919, (40 Stat. 1057, 1097) the value of all the property transferred to the trustees should be included in her estate. The taxpayer paid the resulting additional taxes and sued to recover them. Section 402(c) purported to tax transfers or trusts intended to take effect in possession or enjoyment on or after the decedent's death *whether such transfer or trust was made or created before or after the passage of the act.*

Nichols v. Coolidge, therefore, presented the question of the power of Congress to tax transfers made prior to the passage of the act imposing the tax. This question had not been expressly decided by this Court in the earlier cases in which the Revenue Acts had been construed as not intended to impose a tax upon transfers so made. (*Lewellyn v. Frick*, 268 U. S. 238, 251 (1925); *Shwab v. Doyle*, 258 U. S. 529, *supra*; *Knox v. McElligott*, 258 U. S. 546, *supra*.) In the *Nichols* case, the court held that the attempt by Congress to make the statute retroactive offended the Fifth Amendment. The Court said (274 U. S. 531 at p. 542):

“And we must conclude that §402(c) of the statute here under consideration, in so far as it requires that

there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Helvering v. Helmholz, 296 U. S. 93, *supra*, involved the taxability of a trust created in 1918. The trust contained certain provisions in substance that all parties in interest including the settlor might, by concurrent action, terminate the trust. The Revenue Act in effect when the trust was created would not have required the trust property to be included in the settlor's gross estate. The Commissioner of Internal Revenue took the position that the provisions of the trust with respect to termination required that the corpus be included in the settlor's gross estate under an act thereafter adopted, Section 302(d) of the 1926 Act, (44 Stat. 71) as a trust which was subject to the exercise of a power by the decedent in conjunction with other persons to alter, amend or revoke. This Court held that the subsequently adopted act could not constitutionally tax the transfer, Mr. Justice Roberts saying, for a court unanimous upon that point, at page 97 :

"Another and more serious objection to the application of §302(d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke v. Northern Trust Co.*, 278 U. S. 339. If §302(d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols v. Coolidge*, 274 U. S. 531."

White v. Poor, 296 U. S. 98, *supra*, passed upon substantially the same question as *Helvering v. Helmholz*, all the

justices again agreeing that Congress could not make Section 302(d) retroactive because of the Fifth Amendment.

The three cases just discussed were not decided upon peculiarities of the particular sections of the Revenue Act involved. They were decided upon the broad general principle that Congress may not make an act retroactive so as to include in the decedent's gross estate property transferred prior to the imposition of the tax. There is, therefore, no basis for distinguishing the case now before the court, which involves Section 302(e) of the 1926 Act (44 Stat. 71), from *Helvering v. Helmholz* and *White v. Poor* which involved Section 302(d) of the same Act, or from *Nichols v. Coolidge*, which involved Section 402(c) of the Revenue Act approved February 24, 1919, (40 Stat. 1057, 1097).

In *Nichols v. Coolidge*, *Helvering v. Helmholz* and *White v. Poor*, in each case, the death of the settlor was the occasion for the ripening of rights of the survivors in the whole property. But that fact did not prevent this Court from holding that in cases where the survivors had had vested interests in the property before the incidence of the federal estate tax act those vested interest could not be taxed upon the ripening of the additional rights therein. It is true that the rights protected in those three cases were the rights of beneficiaries of trusts and that the right here claimed to be protected is the right of the survivor of two joint tenants. But the right of that joint tenant is the fruit of what this Court has characterized as a completed transaction which cannot be reached except by a retroactive statute (See pp. 13-16 *supra*). There is no more reason for voiding a retroactive statute where it attacks the interests of trust beneficiaries as in the *Nichols*, *Helmholz* and *White* cases, than where it attacks the interest of the survivor of two joint tenants as in the case at bar. Indeed, Mrs. Folger's rights as a joint tenant did not differ from those which could have been given her under a trust to divide a fund into two shares and pay the spouses the income from the respective shares for their joint lives and then to convey

the property to the survivor with the right of the income beneficiaries to alienate their shares during the joint lives. As an example, a trust of that character has been drawn in the stereotyped language of such instruments and is given in Appendix B at page 39.

The only practical distinction urged by the court below between the case at bar and the cases of protected vested interests was that until the decedent's death the survivor faced the hazard of losing her interest to the decedent if she should prove to be the first to die.

In most respects Mrs. Folger's interest in the joint property was more clearly a vested property right than were the interests of the trust beneficiaries which were protected in the *Nichols*, *Helmholz* and *White* cases. There was no interposition of a trustee in Mrs. Folger's case and she could deal with her interest in the trust property as she saw fit.

That was the meaning of the old law French rule that tenants by the entirety are seized *per tout et non per my* and joint tenants are seized *per tout et per my* and tenants in common are seized *per my et non per tout*. (*Matter of Klatzel*, 216 N. Y. 83, 87 (1915); 4 Kent Comm. 8th Ed., *359, *368).

It is true that while the trust beneficiaries in the *Nichols*, *Helmholz* and *White* cases could not deal with their shares as freely as could Mrs. Folger, there was no risk that their interests in the trust property would be lost by the death of all of the beneficiaries prior to the death of the settlor, corresponding to the risk in Mrs. Folger's case that her property interest might be lost if she had died before Mr. Folger.

It is on that distinction that the decision below must be supported if at all. The extinction of that risk (that Mrs. Folger's interest might go to Mr. Folger if she predeceased him without having conveyed it) was the only change made to Mrs. Folger's half interest in the joint property as a result of her husband's death.

Taxation is a practical, not metaphysical, matter. The statute in terms taxes the interest "held by the decedent and any other person as joint tenants", i. e., the sum of all of the rights which go to make up the joint estate. That is palpably unconstitutional as to such of those rights (if any) as were vested prior to the passage of the act. One such right was Mrs. Folger's right to step into a broker's office and sell her interest in the stocks held in the joint names for exactly one-half of the total value. It was vested as securely as the right of the trust beneficiaries in the *Nichols*, *Helmholz* and *White* cases. It was worth exactly what she could get for it, i. e., one-half the market value of stocks held in joint tenancy. The extinguishment on Mr. Folger's death of the risk of loss added not one penny to its value.

This Court in *Knox v. McElligott*, 258 U. S. 546, *supra*, and *Cahn v. U. S.*, 297 U. S. 691, *supra*, when it held that the interest of the survivor could be reached only by a "retroactive statute" taxing the fruit of a "completed transaction" (see *supra*, pp. 13-16) fixed one-half of the whole as the interest which it exempted from the operation of the non-retroactive statute then before the court. No deduction was made for the risk which had been run by the survivor at all times during the joint lives that he might lose his interest by being the first to die.

Thus an interest in the joint property, worth one-half of the value of such property, was vested in Mrs. Folger before the passage of any federal estate tax act. Therefore any additional interest which she obtained in that property after the passage of the act, by reason of the death of Mr. Folger or otherwise, could not have represented more than the other half of its value.

While no tax can constitutionally be levied upon the vested interest of Mrs. Folger in the joint estate created before the passage of any federal estate tax act, and while there is nothing in the federal estate tax act which permits the levy of a tax upon less than the sum of all of the interests in a joint estate, the plaintiff has, by returning one-half for taxation, conceded that where any part of the estate may

constitutionally be subjected to taxation the statute will serve to do so. The statute will not, however, serve to subject to taxation more than the interest in the property which Mrs. Folger received by reason of the death of Mr. Folger. That interest could not have had a value in excess of one-half of the value of the whole joint estate. We concede the right to levy a tax on that half.

The court below attempted to justify the taxation of the whole by saying (B. 159):

“In the instant case, before the death of the decedent, the surviving tenant had the right to possess and use the whole property. So too did her husband.”

The court would have us believe that, in spite of Mrs. Folger's right to one-half of the dividends on the stock and her right to sever a half interest in the principal,* Congress, on her receiving the rest of the rights of the property at her husband's death, can levy the same tax as though she had never before had any rights in the property and this because of the old legal scholars' definition of the joint tenant's interest as an ownership of the whole as well as an ownership of the half. We are told in effect that since the schoolmen chose to express the rule of survivorship by saying that each tenant owned the whole, *ergo*, when Mr. Folger died the whole estate passed to Mrs. Folger.

The danger of using this metaphysical argument in the practical world of estate taxation was well illustrated in *Tyler v. United States*, 281 U. S. 497, *supra*. There it was the taxpayer who relied upon the magic of the old law French definition. The case involved a tenancy by the entirety where each tenant is said to be seized *per tout*, or, in other words, to own the whole. Although the estate was created after the incidence of the federal estate tax act, the taxpayer argued that it could not be subjected to tax on the death of one of the tenants because the survivor had owned the whole all along and received nothing. This Court upheld the tax,

* *Hiles v. Fisher*, 144 N. Y. 306, 312, 315 (1895).

Mr. Justice Sutherland rejecting the argument as follows (p. 503):

"The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

• • • • • •

"Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler* case, No. 428), the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

In spite of the rejection by the *Tyler* case of the argument that seizin *per tout* meant that the surviving tenant received nothing on the death of the decedent, it was again advanced, this time with respect to joint tenancies, and was

again rejected by this Court. The case where the argument was asserted was *Gwinn v. Commissioner*, 287 U. S. 224 *supra*. The case involved a joint tenancy created before any federal estate tax act and death occurred after the retroactive amendment. But as the joint tenants contributed equal shares, only one-half was subject to tax under the terms of the statute. Hence the question of the right to tax the other half was not involved. The taxpayer, however, objected to the taxation of even the decedent's half, maintaining (p. 226):

"That under the tenancy created in June 1915, each party acquired immediate joint ownership in the whole property; that is, interest therein then became completely vested and no change in title or transfer of interest occurred by reason of the co-tenant's death."

This Court answered by quoting parts of the opinion in the *Tyler* case quoted above, and pointing out (p. 229) that "death became the generating source of definite accessions to the survivor's property rights." The metaphysical argument that the survivor did not even receive the rights theretofore held by the decedent was properly rejected.

Applying the words of the Court to the case at bar, the death of Mr. Folger became the generating source of definite accessions to property rights of Mrs. Folger. While death was the source of accessions to these property rights, death was not the source of the rights themselves. The original rights existed prior to the incidence of any federal estate tax act. Only the accessions came afterward and only the accessions can be taxed. The accessions were but one-half.

After this Court had held in the *Tyler* case, and reiterated in the *Gwinn* case, that the power to tax tenancies by the entirety and joint tenancies would be judged by realities rather than fictions, there came before it in *Third National Bank & Trust Co. v. White*, 287 U. S. 577 *supra*, the case of a tenancy by the entirety created prior to the incidence

of the federal estate tax act. The principle of adhering to the realities, enunciated in the *Tyler* and *Gwinn* cases, coupled with what had been said in the *Tyler* case about the nature of a tenancy by the entirety, was determinative of the question. The common law fiction that each spouse owned the whole was ignored and the case was determined upon the reality as stated in the *Tyler* case that upon the death of one of the tenants by the entirety leaving a survivor "then, and then only, she acquired the power not theretofore possessed, of disposing of the property by an exercise of her sole will", and that under those circumstances "death brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result . . . to be measured in whole or in part, by the value of such rights." The opinion of this Court was *per curiam* as follows:

"Judgment affirmed. *Tyler v. United States*, 281 U. S. 497, 504, 505; *Gwinn v. Commissioner* ante p. 224."

It is at page 504, thus referred to by this Court, that the words above quoted from the *Tyler* opinion occur, and on page 505 is to be found the holding that to tax the value of property, which, as a consequence of the death of one tenant by the entirety, was relieved from restrictions so as to produce in the survivor right of sole proprietorship, was obviously neither arbitrary nor capricious.

In *Helvering v. Bowers*, 303 U. S. 618 (1938), a case precisely like the *Third National Bank* case, the Circuit Court of Appeals had failed to follow it and this Court reversed the decision below, this time giving the *per curiam* opinion,

"The judgment is reversed upon the authority of *Tyler v. United States*, 281 U. S. 497."

It was the *Tyler* case that had held that taxation was a practical and not a theoretical matter, and that, looking at

the matter practically, a tenant by the entirety, while both spouses were alive, had nothing instead of having everything. Thus the creation of a tenancy by the entirety, even though it be prior to the incidence of any federal estate tax act, creates no property right in either spouse to be protected by the Fifth Amendment.

The distinction is clear between taxing the interest of the survivor in a tenancy by the entirety where the taxing act was passed after the creation of the tenancy and taxing the interest of the survivor in a joint tenancy under those circumstances. For instance, in *Knox v. McElligott*, 258 U. S. 546, *supra*, this Court has held with respect to the interest of the surviving tenant in a preexisting joint tenancy that only an expressly retroactive federal estate tax act could reach it, but this Court has never so decided with respect to the interest of the surviving tenant in a preexisting tenancy by the entirety. The tenant by the entirety receives everything upon the death of the spouse and owned and could dispose of nothing prior to that death, so that everything may be taxed. A joint tenant receives only one-half upon the death of his co-tenant and owned and could dispose of one-half prior to that death, so that only one-half may be taxed. Tenants by the entirety are seized *per tout et non per my* and joint tenants are seized *per tout et per my*, which is to say, that in the case of tenants by the entirety there is survivorship and neither can sever during the lifetime of the other one, and in the case of joint tenants there is not only survivorship, but in addition, each can sever his share during the joint lives. The *Third National Bank* and *Bowers* cases which deal with tenancies by the entirety thus lend no support to the decision below.

In spite of the fact that a theoretical application of the old definition of a tenancy by the entirety and joint tenancy would have resulted in decisions for the taxpayer in the *Tyler* and *Gwinn* cases, the Government here seeks to apply it against the taxpayer. The Government attempts to sustain a tax upon the whole, when only half was transferred

after the incidence of the taxing act, by invoking the same old fiction that the interest of each joint tenant pervades the whole until the death of one. The only sense in which it may be said that the interest of each joint tenant pervades the whole of the property held in joint tenancy is the same sense in which it may be said that the interest of each tenant in common pervades the whole of the property held in common. It would be quite as logical to tax the whole of a tenancy in common, when one tenant leaves his share to his widow, because the interest of each tenant in common pervades the whole, as it is to tax the whole of a joint tenancy on that theory when one joint tenant dies and his share thus passes to the survivor.

But the Government in its brief in this Court in *United States v. Jacobs*, No. 391, October Term 1938, urges that this metaphysical conception that the survivor receives the whole upon the death of the decedent has been recognized by this Court in *Foster v. Commissioner*, 303 U. S. 618 *supra*. This is expressed in the brief as follows (p. 12): "In the case of a joint tenancy it also is true that the interest of the decedent pervades the whole property and ceases only at his death, which perfects the interest of the survivor in the whole estate. This is the premise which necessarily underlay the decision in *Foster v. Commissioner*, *supra*, permitting the taxation of the entire joint tenancy."

The Government is in error in thus saying that the *Foster* case can be supported only on the metaphysical conception of the joint tenancy. It must be borne in mind that it was a case which permitted the taxation of the whole of a joint tenancy which was created after the incidence of the federal estate tax act. Such a tax is supported upon the power of Congress to impose an excise upon a transfer made after the incidence of the taxing act. The Gift Tax is a familiar example of such an excise. The existing federal estate tax act, in its operation upon the survivor's interest in jointly held property where the transfer to the joint names was made after the incidence of the act, is really a tax upon the original transfer and differs from the Gift Tax only

in that payment of tax is postponed until the death of one of the joint tenants.

It is sometimes said that, granting that Congress cannot constitutionally tax the whole of joint tenancies created before the taxing act, it could so manipulate the rate of taxation that the net result would be precisely the same as though it actually had the power to tax the whole of the jointly held property, and that our quarrel is therefore merely with the verbiage rather than with the substance of the statute. The tax being a graduated one, such a statute would have to provide that in the case of joint tenancies there should be included in the taxable estate only such fractional part of the property held in joint tenancy as passed to the survivor or survivors upon the death of the decedent, and that the rate of taxation upon the property so passing should be increased sufficiently above the normal rates so that the total tax should be exactly the same as if the whole property had been held by the decedent in fee simple.

We are unable to distinguish this contention from the one made in *Nichols v. Coolidge*, 274 U. S. 531, *supra*, where the Government urged that the estate which had vested before the incidence of the taxing act was not being taxed but was merely being made the measure of the tax on the decedent's estate. The answer here is the answer there given by Mr. Justice McReynolds (p. 541):

"Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results."

POINT II.

The court below erred in construing the statute as requiring the inclusion in the gross estate of shares of stock given by Henry C. Folger to Emily C. J. Folger and by her contributed to the joint tenancy, all before the effective date of any Federal Estate Tax Act.

We here print for convenience the provisions of Section 302 of the Revenue Act of 1926 (44 Stat. 71) in force at the date of the death of Henry C. Folger which will be discussed in this point. The entire section is printed in Appendix A at pages 35-37, *infra*.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

• • • • •

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: * * *." (Two provisos, immaterial here, are appended to Section 302(e)).

• • • • •

"(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The individual property of Mrs. Folger acquired by her absolutely from Mr. Folger from two to four years before the passage of any federal estate tax act, and which she transferred to the joint names of herself and her husband prior to any federal estate tax act, should not properly be included in Mr. Folger's gross and net estates. The case at bar is apparently the first where the facts raise this point. It involves property valued at \$846,772.15, the tax upon which petitioner computes at \$26,298.45 (R. 103).

It is our position that even if Congress could constitutionally have subjected the entire joint estate to federal estate tax, the statute, properly construed, exempts the contributions made by the survivor, Mrs. Folger.

The exemption on which we rely is that part of Section 302 (e) of the Revenue Act of 1926 (44 Stat. 71) which reads:

"* * * except such part thereof as may be shown to have originally belonged to (the survivor) and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth."

Congress thus expressly exempted from taxation so much of the property held in joint tenancy as may be shown to have originally belonged to the survivor and never to have been received from the decedent for less than a fair consideration. There is thus an exemption in favor of contributions by the survivor and a limitation of the exemption to contributions of property which were never received from the decedent. The question is whether that limitation is prospective only or whether it is retroactive back beyond the date when it was written into the law. If it is prospective only, it should be read as exempting all contributions by the survivor which were "never" *after the passage of this act* "received from the decedent", and Mrs. Folger's contributions are exempt because they were received from the decedent prior to the passage of the act. If, on the other hand, the limitation on the exemption is re-

troactive, then Mrs. Folger's contributions are taxable because they were *at some time* received from the decedent.

This court has been loath to construe the federal estate tax act as retroactive. In *Shwab v. Doyle*, 258 U. S. 529 (*supra*), the statute taxed gifts in contemplation of death made *at any time*, but this court (p. 536) construed that expression to mean *at any time* "after the passage of this act." (See also *Hassett v. Welch*, 303 U. S. 303, 308 *supra*.)

The word "never" is but the negative of the words "at any time", which were construed in the *Shwab* case as prospective only. (Webster's New International Dictionary, Second Edition, 1937.) There is thus no obstacle to construing the word "never" in the statute under consideration as meaning "not at any time after the passage of this act" if the rest of the statute indicates that that was the intent of Congress.

Examining that intent we find that the reason for exempting contributions by the survivor is clear. Congress wished to tax only those transfers where the ultimate effect was a transfer from one joint tenant to the other. If a wife contributed 100% of the joint property and the husband died, Congress wanted to exempt the transfer of what had been the wife's own property back to herself. That was the reason for exempting contributions of the survivor. If, however, Congress stopped there, it would have invited tax evasion. The husband might have wished to give his property to his wife upon his death and to avoid any tax upon it. He could give it to her on one day and on the next have her give it to the joint estate. Then, on his death, there would have been in substance a transfer from him to his wife, but it would have been exempt because the property would have technically been contributed to the joint tenancy by the wife. It is admitted on all hands (*e. g.*, opinion below, R. 160), that it was in order to avoid this evasion that the limitation on the exemption was inserted in the statute. That purpose is fully carried out by a prospective interpretation. There was no reason for making the

limitation retroactive and excluding from the benefit of the exemption property which the decedent had given to the contributor before there was any federal estate tax act to be evaded. In supporting the interpretation of the Commissioner of Internal Revenue, the government seeks to have this court construe a provision admittedly designed to prevent tax evasion in such a way as to penalize transactions which took place when there was no tax to evade. Since there is no reason for construing the limitation as retroactive and there is room for construing it as either retroactive or prospective, it should be construed as prospective only and the contributions made by Mrs. Folger from gifts made by Mr. Folger to her before any federal estate tax act should be exempted from tax.

The purposes of the act will be fully served and evasion will still be impossible if the limitation upon the exemption be construed as prospective only. The Government in its brief in opposition to the petition for *certiorari* in the case at bar intimates (p. 7) that subdivision (h) of Section 302 of the Revenue Act of 1926, which was added in 1924, with the express purpose of making the federal estate tax act retroactive with respect to the "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described" in Section 302, makes the act retroactive as well with respect to the "receiving" or "acquiring" from the decedent of the property afterwards contributed to the joint estate. That is precisely what subdivision (h) does not do. It carefully enumerates the transactions and interests as to which the federal estate tax act is made retroactive. Each of the "transfers, trusts, estates, interests, rights, powers, and relinquishment of powers" referred to in the retroactive section can be identified as one of the subjects of the taxes imposed by Section 302. Section 302 (e) in describing the transaction by which the contributor receives from the decedent the property afterwards contributed to the joint tenancy uses none of these words. The words used in subdivision (e) are "received or acquired".

Not only does the language of subdivision (h) thus fail to make the act retroactive with respect to the receipt of the property by the contributor, but the omission is just what one would expect. The natural intention of the legislature in desiring to make the taxing act retroactive would be to make it retroactive with respect to the subject matter of the tax and not to the limitations of exemptions from tax. As conceded by the Government in its brief in opposition to the petition for *certiorari*, at page 6, "The tax is not laid upon the prior gift to the survivor, but upon the event which occurs at death and which accomplishes or completes a transfer to the survivor of what was first the decedent's property." Neither the provisions of the act which lay the tax nor its provisions which make the act retroactive extend to the prior receipt or acquisition by the survivor.

Injustice results from the construction made by the court below. Before the passage of the first federal estate tax act, there was no signal hung out to warn a person that in creating a joint estate she ought to choose property which she had never received or acquired from the other joint tenant. There would be no reason in the mind of such a person for distinguishing between the two classes of property. She surely could not be expected to anticipate the passage of a statute so capricious as to impose a tax in the case of one class and not in the case of the other.

We submit that this Court should construe the statute in accordance with the principles pronounced in *Lewellyn v. Frick*, 268 U. S. 238 (*supra*), where Mr. Justice Holmes, after stating that acts of Congress are to be construed so as to avoid doubt as to their constitutionality, said at page 251 (*italics ours*):

"Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose *before* their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

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CONCLUSION.

The cause should be remanded with instructions to modify the judgment by adding thereto the sum of \$26,298.45, with interest thereon from the 17th day of May, 1933, representing the federal estate tax based upon the value of the property contributed by Emily C. J. Folger to the joint tenancy, and by further adding thereto the sum of \$26,578.88, with interest thereon from the 17th day of May, 1933, representing the excess of the federal estate tax based upon one-half the value of the property held in said joint tenancy over and above said federal estate tax based upon the value of said contributed property. (See R. 103, fol. 309.)

Respectfully submitted,

✓ E. J. DIMOCK,
Attorney for Petitioner.

E. J. DIMOCK,
C. O. DONAHUE,
✓ J. D. RAWLINGS,
Of Counsel.

APPENDIX A.

*Revenue Act of 1926, Section 302:**

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of \$5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

"(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or other-

* Involved in case at bar.

wise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of \$5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

“(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided, further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

"(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over \$40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

"(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

"(i) If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subdivisions (c), (d), and (f) of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

*Regulations 70, Art. 22:**

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY.
—The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any

* In force on June 11, 1930, the date of the death of the testator, and until July 3, 1930.

person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for the purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common."

Regulations 80, Art. 22:†

"PROPERTY HELD JOINTLY OR AS TENANTS BY THE ENTIRETY. —The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. Section 302(e), as amended, applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

† Presently in force.

APPENDIX B.

An assignment of property to trustees in trust:

To divide the same into two equal shares and

As to the first of such equal shares, to collect the income thereof and to pay the net income thereof unto Henry C. Folger during the joint lives of Henry C. Folger and Emily C. J. Folger, and at the termination of such joint lives, to assign, transfer and deliver the principal thereof unto the survivor of said Henry C. Folger and Emily C. J. Folger.

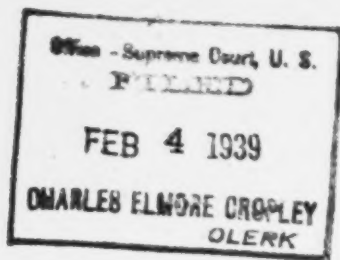
As to the second of such equal shares, to collect the income thereof and to pay the net income thereof unto Emily C. J. Folger during the joint lives of Henry C. Folger and Emily C. J. Folger, and at the termination of such joint lives, to assign, transfer and deliver the principal thereof unto the survivor of said Henry C. Folger and Emily C. J. Folger.

As to each of such trusts, the person entitled to the income therefrom is hereby empowered to sell the property subject thereto at any time during said joint lives and to receive the proceeds thereof free of any trust, and in the event of such sale, the trustees shall assign, transfer and deliver the principal of the other trust unto the person theretofore entitled to the income thereof.

Until the termination of said joint lives or until the prior termination of the trusts created hereby, the said trustees shall keep the property constituting said two trusts in a single consolidated fund in which the separate trusts shall have undivided interests.

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No. 482.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

EDWARD JORDAN DIMOCK, as Substituted Executor of the Last Will and Testament of HENRY C. FOLGER, Deceased, and as Executor of the Last Will and Testament of EMILY C. J. FOLGER, Deceased,

Petitioner,

against

WALTER C. CORWIN, late Collector of Internal Revenue,
First District of New York.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL MEMORANDUM FOR PETITIONER.

Since the argument of this case and its companion *United States v. Jacobs*, 391, counsel for the petitioner, in examining notes taken during the argument of the *Jacobs* case, has found that Mr. Chief Justice Hughes asked a question which had not been answered on any brief and which, according to counsel's recollection, was not directly answered on argument. Counsel therefore requests leave to submit this memorandum for the purpose of supplying the omission.

The question was in substance this: If the effect of *Foster v. Commissioner*, 303 U. S. 618, which approved taxation of the survivor's interest in a joint tenancy by

a prospective statute was not to approve taxation of the survivor's interest by a retroactive statute why did this Court cite in its *per curiam* opinion *Tyler v. United States*, 281 U. S. 497, and *Gwinn v. Commissioner*, 287 U. S. 224?

The answer is as follows:

There are two questions in these cases of the constitutionality of a Federal Estate Tax upon tenancies by the entirety and joint tenancies. The first arises in all cases; the second only where the estate has been created prior to the passage of the taxing act. The first is whether the estate is of such a character that death is the generating source of new rights in the survivor so that a death excise may be levied upon the estate of the decedent. The second is, admitting that the estate is such that death is the generating source of new rights and that therefore the death excise might in the usual case be levied, whether the inclusion of the value of the estate or some certain part thereof in determining the tax base, is not in substance confiscation of a vested interest. The first question is really one of capricious classification; the second is one of the retroactive taxation of a vested interest.

For example, in *Nichols v. Coolidge*, 274 U. S. 531, death was clearly the generating source of the rights of the equitable remainderman when the settlor who was the equitable life tenant died, but this Court held that it was unconstitutional confiscation for a retroactive statute to levy an estate tax based upon the interest of the remainderman.

Both the *Tyler* case and the *Gwinn* case involved the question of capricious classification. It was the only question involved in the *Foster* case. Hence the citation of the *Tyler* and *Gwinn* cases in the *Foster per curiam* opinion could only have been for the purpose of indicating that the subjection of the survivor's interest to federal estate taxation was not an unconstitutional classification. The classification would have been constitutional even if the

estate had been created before the taxing act; it would have been the taxing of the vested interest which would have been unconstitutional.

It is true that the *Gwinn* case also involved the question of whether there was retroactive taxation of a vested interest in that it upheld the constitutionality of the taxation of the decedent's half of a joint estate created before the Federal Estate Tax Act but that was not the reason why it was cited in the *Foster* opinion.

Respectfully submitted,

E. J. DIMOCK,

Attorney for Petitioner.

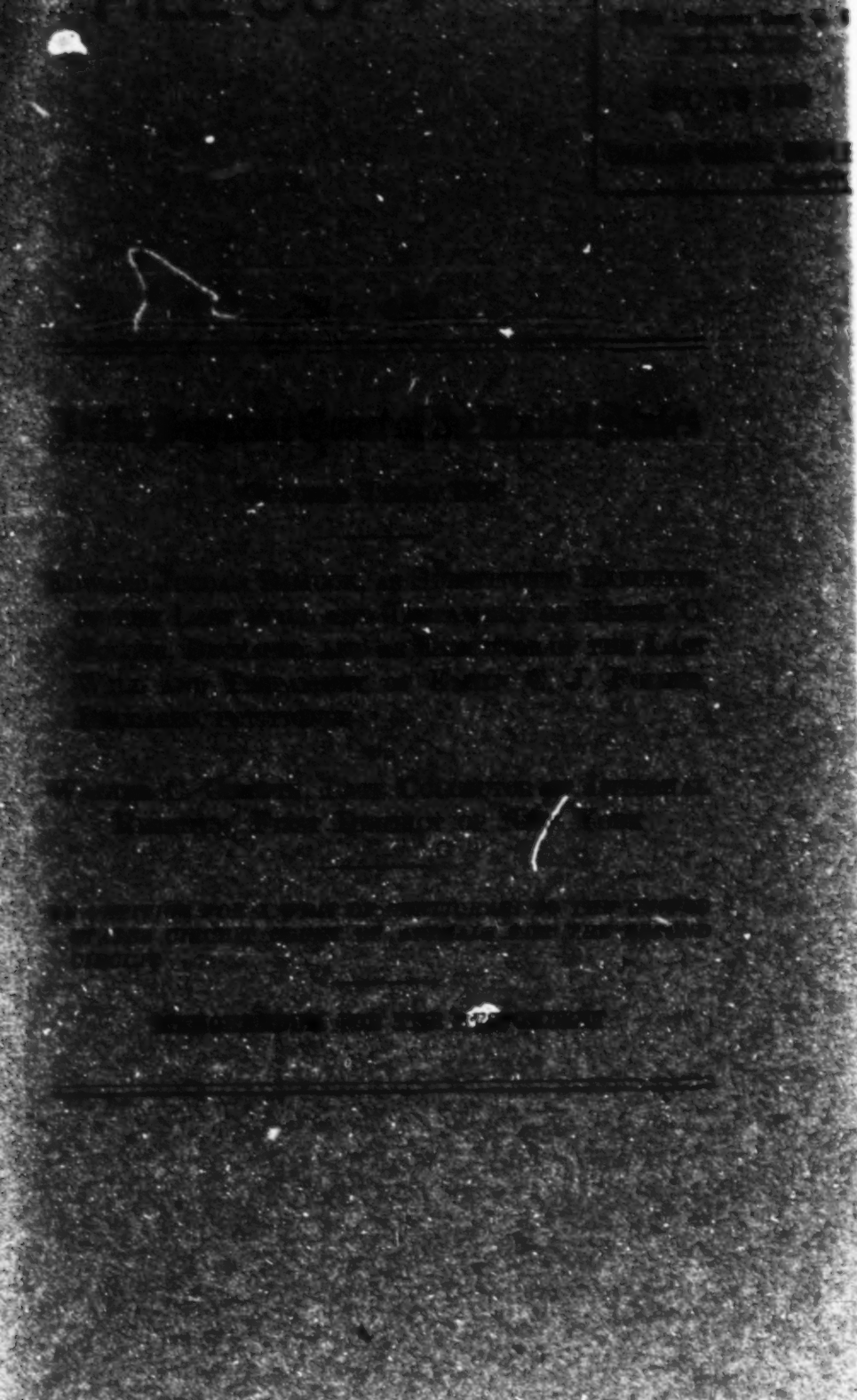
E. J. DIMOCK,

C. O. DONAHUE,

J. D. RAWLINGS,

Of Counsel.







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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 482

EDWARD JORDAN DIMOCK, AS SUBSTITUTED EXECUTOR
OF THE LAST WILL AND TESTAMENT OF HENRY C.
FOLGER, DECEASED, AND AS EXECUTOR OF THE LAST
WILL AND TESTAMENT OF EMILY C. J. FOLGER,
DECEASED, PETITIONER

v.

WALTER C. CORWIN, LATE COLLECTOR OF INTERNAL
REVENUE, FIRST DISTRICT OF NEW YORK

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT*

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 112-129) is reported in 19 F. Supp. 56. The opinion of the Circuit Court of Appeals (R. 154-163) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1938 (R. 164). The

petition for a writ of certiorari was filed November 22, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the full value of property held by the decedent and his wife as joint tenants, or only one-half thereof, may be included in the gross estate of the decedent as a measure for Federal estate tax where the decedent furnished the entire consideration for the property and the joint tenancy was created prior to the passage of the first Federal estate tax Act in 1916.

2. Whether the value of property given the surviving joint tenant by the decedent and contributed by her to the joint tenancy prior to the passage of the first Federal estate tax Act may be included in the decedent's gross estate where no consideration in money or money's worth was paid the decedent for such property.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 9-13.

STATEMENT

On June 11, 1930, Henry C. Folger died a resident of New York, his wife, Emily C. J. Folger, surviving him (R. 74). Mr. Folger was a New York lawyer who had been chairman of the board

of directors of the Standard Oil Company of New York (R. 74, 76).

At the time of his death, Mr. Folger, with Mrs. Folger, owned, as joint tenants, shares of stock in a number of Standard Oil companies (R. 86, 87). The joint tenancies in these stocks were created prior to September 9, 1916, the effective date of the first Federal estate tax Act (R. 87).

In 1912 Mr. Folger began giving Mrs. Folger varying amounts of stock in the Standard Oil companies. Prior to May 29, 1912, he gave her 251 shares of capital stock of the Standard Oil Company of New York, and prior to March 10, 1914, he gave her 656½ shares of the Standard Oil Company (California) (R. 90). The shares of both of these companies were registered in her individual name on the books of the corporations (R. 45).

No consideration in money or money's worth was paid to the decedent, Henry C. Folger, for said stocks by Emily C. J. Folger (R. 47).

In 1914 Mr. Folger began establishing joint accounts with Mrs. Folger in the stocks of the Standard Oil companies, registering the stocks in their joint names (R. 86, 87). Mrs. Folger transferred to these accounts some of the shares Mr. Folger had given her one or more years before. On February 9, 1915, she transferred ½ share of the Standard Oil Company (California) into a joint account (R. 91). She transferred 250 of the 251 shares of the Standard Oil Company of New York into their

joint names on February 9, 1916 (R. 90). On February 24, 1916, she transferred into their joint names the remaining 656 shares of the Standard Oil Company (California) (R. 91).

The shares transferred by Mrs. Folger to the joint names had a value as of the date of the death of Mr. Folger of \$846,772.15 (R. 90, 91), and those transferred by Mr. Folger \$2,760,247.04, making a total death value of the shares transferred by both of \$3,607,019.19 (R. 89).

Only one-half of the value of the jointly held property was returned by the estate for taxation. The Commissioner of Internal Revenue assessed additional estate taxes based upon the inclusion of the full value of such property.

The estate paid the assessment, filed a timely claim for refund of the additional taxes paid and upon its rejection brought this suit for recovery (R. 92-94).

The District Court concluded as a matter of law that the Commissioner (a) properly determined that the full value of the property held in the joint accounts should be included in the gross and net estates of the decedent for estate tax purposes, and (b) properly determined that no part of the value of the joint estates, representing property transferred thereto by Mrs. Folger, should be excluded from the gross and net estates (R. 98, 99). The Circuit Court of Appeals for the Second Circuit

affirmed the judgment of the District Court (R. 164).

ARGUMENT

1. Petitioner is correct in saying that the instant decision is in conflict with *Jacobs v. United States*, 97 F. (2d) 784 (C. C. A. 7th), certiorari granted, November 7, 1938 (No. 391). The Government, therefore, does not oppose the granting of a writ of certiorari, but suggests that it be limited to the first question presented by the petitioner. In this connection, however, we submit that the present decision is clearly correct under principles which this Court has already enunciated.¹ The *Jacobs* case is a departure from these principles.

2. The second question presented by the petition does not merit review. It is a stipulated fact that Mrs. Folger received the stock from Mr. Folger without giving him any consideration in money or money's worth (R. 47). The question is not substantial and is unlikely to arise in future cases, and there is no conflict.

Petitioner relies upon an exemption—which must be strictly construed in favor of the Government. The question is stated by petitioner to be whether the exemption is prospective only, or

¹ *Tyler v. United States*, 281 U. S. 497; *Phillips v. Dime Trust & S. D. Co.*, 284 U. S. 160; *Third National Bank & T. Co. v. White*, 287 U. S. 577; *Foster v. Commissioner*, 303 U. S. 618; *Helvering v. Bowers*, 303 U. S. 618.

whether it is retroactive back beyond the date when it was written into the law.

We think the statute as it stands does not accomplish a retroactive result. The tax is not laid upon the prior gift to the survivor, but upon the event which occurs at death and which accomplishes or completes a transfer to the survivor of what was first the decedent's property. It is wholly consistent with the purpose of such a tax to include every part of the joint property which ever belonged to the decedent alone and that is the test which this statute prescribes.

Petitioner's contention that the Act is prospective only is premised upon his insertion of words in the statute, "*after the passage of this act*" (Pet. p. 7), which were not inserted by Congress. On the contrary Congress has provided, and this Court has applied, subdivision (h) of Section 302, which specifically makes subdivision (e) applicable to any time prior to the enactment of the Act. *Gwinn v. Commissioner*, 287 U. S. 224.

The first *proviso* of Section 302 (e) reads as follows:

Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only

such part of the value of such property as is proportionate to the consideration furnished by such other person: * * *

This limited express exemption indicates that Congress did not intend the additional implied exemption sought by the petitioner. *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 377. If Congress had not intended the exemption to apply only to property *never* received from the decedent for less than an adequate consideration (*infra*, p. 9), whether before or after the effective date of the Act, it would have said so.

Petitioner's argument to support his theory that the Act in this respect is prospective only is without weight, because the decisions of this Court upon which the argument is based were rendered with respect to statutes that do not include such a clear expression of Congressional intent as appears in subdivisions (e) and (h) of Section 302 of the Revenue Act of 1926. The difference between this Court's decision in *Knox v. McElligott*, 258 U. S. 546, and its later decisions, beginning with *Tyler v. United States*, *supra*, clearly illustrates this fact.

Congress has the power to include such prior gifts and has exercised it in plain and compelling language. There is no reason for reading into the statute an exception which Congress has nowhere indicated.

CONCLUSION

If the petition for a writ of certiorari is granted,
it should be limited to question "1" as stated above.

Respectfully submitted.

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Attorney.

DECEMBER 1938.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 304:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent

of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Revenue Act of 1926, c. 27, 44 Stat. 9, 70:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the considera-

tion with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

Treasury Regulations 70, promulgated pursuant to Section 1101 of the Revenue Act of 1926 (1926 ed.):

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916. The statute specifically reaches property

held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for the purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

Treasury Regulations 80, promulgated pursuant to Section 1101 of the Revenue Act of 1926, as amended (1934 ed.):

ART. 22. Property held jointly or as tenants by the entirety.—The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest,

devise, or inheritance. This section of the statute applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

FILED
JAN 28 1939

CHARLES HENRY COMPTON
CLERK

No. 482

In the Supreme Court of the United States

OCTOBER TERM, 1938

EDWARD JORDAN DEMOCK, AS SUBSTITUTED EXECUTOR OF THE LAST WILL AND TESTAMENT OF HENRY C. FOLGER, DECEASED, ETC., PETITIONER

v.

WALTER C. CORWEN, LATE COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF NEW YORK

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 482

EDWARD JORDAN DIMOCK, AS SUBSTITUTED EXECUTOR OF THE LAST WILL AND TESTAMENT OF HENRY C. FOLGER, DECEASED, ETC., PETITIONER

v.

WALTER C. CORWIN, LATE COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the Eastern District of New York (R. 112-129) is reported in 19 F. Supp. 56. The opinion of the Circuit Court of Appeals (R. 154-163) is reported in 99 F. (2d) 799.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1938 (R. 164). The

petition for a writ of certiorari was filed November 22, 1938, and was granted January 3, 1939 (R. 167). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the full value of property held by the decedent and his wife as joint tenants, or only one-half thereof, may be included in the gross estate of the decedent as a measure for Federal estate tax where the decedent furnished the entire consideration for the property and the joint tenancy was created prior to the passage of the first Federal estate tax Act in 1916.

2. Whether the value of property given the surviving joint tenant by the decedent and contributed by her to the joint tenancy prior to the passage of the first Federal estate tax Act may be included in the decedent's gross estate where no consideration in money or money's worth was paid the decedent for such property.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 19-25.

STATEMENT

On June 11, 1930, Henry C. Folger died a resident of New York, his wife, Emily C. J. Folger, surviving him (R. 74). Mr. Folger was a New

York lawyer who had been Chairman of the Board of Directors of the Standard Oil Company of New York (R. 74, 76).

At the time of his death, Mr. Folger, with Mrs. Folger, owned, as joint tenants, shares of stock in a number of Standard Oil companies (R. 86, 87). The joint tenancies in these stocks were created prior to September 9, 1916, the effective date of the first Federal estate tax Act (R. 87).

In 1912 Mr. Folger began giving Mrs. Folger varying amounts of stock in the Standard Oil companies. Prior to May 29, 1912, he gave her 251 shares of capital stock of the Standard Oil Company of New York, and prior to March 10, 1914, he gave her 656½ shares of the Standard Oil Company (California) (R. 90). The shares of both of these companies were registered in her individual name on the books of the corporations (R. 45).

No consideration in money or money's worth was paid to the decedent, Henry C. Folger, for said stocks by Emily C. J. Folger (R. 47).

In 1914 Mr. Folger began establishing joint accounts with Mrs. Folger in the stocks of the Standard Oil companies, registering the stocks in their joint names (R. 86-87). Mrs. Folger transferred to these accounts some of the shares Mr. Folger had given her one or more years before. On February 9, 1915, she transferred ½ share of the Standard Oil Company (California) into a joint account (R. 91). She transferred 250 of the 251 shares of

the Standard Oil Company of New York into their joint names on February 9, 1916 (R. 90). On February 24, 1916, she transferred into their joint names the remaining 656 shares of the Standard Oil Company (California) (R. 91).

The shares transferred by Mrs. Folger to the joint names had a value as of the date of the death of Mr. Folger of \$846,772.15 (R. 90, 91-92), and those transferred by Mr. Folger \$2,760,247.04, making a total death value of the shares transferred by both of \$3,607,019.19 (R. 89).

Only one-half of the value of the jointly held property was returned by the estate for taxation. The Commissioner of Internal Revenue assessed additional estate taxes based upon the inclusion of the full value of such property.

The estate paid the assessment, filed a timely claim for refund of the additional taxes paid, and upon its rejection brought this suit for recovery (R. 92-94).

The District Court concluded as a matter of law that the Commissioner (a) properly determined that the full value of the property held in the joint accounts should be included in the gross and net estates of the decedent for estate tax purposes, and (b) properly determined that no part of the value of the joint estates, representing property transferred thereto by Mrs. Folger, should be excluded from the gross and net estates (R. 98, 99). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 164).

SUMMARY OF ARGUMENT

I. The court below correctly held that Section 302 (e) and (h) of the Revenue Act of 1926 is not unconstitutional in including in the decedent's gross estate the full death value of property contributed by the decedent to the joint tenancy prior to the enactment of the Revenue Act of 1916. In the case of a joint tenancy, as well as a tenancy by the entirety, the death of one tenant brings into being or ripens for the survivor property rights with respect to the whole of such character as to make appropriate the imposition of an estate tax upon the full value of the joint tenancy no matter when it was created. The decision of this Court in *Foster v. Commissioner*, 303 U. S. 618, on the authority of *Tyler v. United States*, 281 U. S. 497, and *Gwinn v. Commissioner*, 287 U. S. 224, and the decision in *Helvering v. Bowers*, 303 U. S. 618, solely on the authority of the *Tyler* case, show that upon the death of one joint tenant there is a shifting of rights as to the whole which justifies the tax.

Decisions of this Court involving solely the construction of prior statutes with respect to joint tenancies are not authority to the contrary here, where the only question concerns the legislative power. Nor are decisions in point which involve the power to tax transfers completed prior to the enactment of a statute taxing them.

II. The language used in Section 302 (e) clearly requires the inclusion in the gross estate of prop-

erty received by the survivor by gift from the decedent and contributed to the joint tenancy before the Revenue Act of 1916. The words "never to have been received or acquired" from the decedent contained in subdivision (e) must refer to any point of time and cannot be limited to mean a receipt after a particular event.

Furthermore, if these words were intended to refer only to a period subsequent to the enactment of the Revenue Act of 1916, a similar construction must be given to the words "except such part thereof as may be shown to have originally belonged to such other person" since the two phrases accompany each other in defining the exemption, and since if acquired from the decedent the acquisition must have coincided with or antedated the time when the property was owned. Such construction would result in a failure to exempt property not acquired by gift from the decedent and owned and contributed by the survivor prior to 1916.

If the portion of Section 302 (e) which refers to the acquisition from the decedent is a limitation on the exemption, it defines an "interest" subject to the tax and therefore intended to be included under Section 302 (h).

The administrative construction contained in the regulations has been to exclude only those contributions by the survivor which at no time in the past had been received as a gift from the decedent, and

the reenactment of the statute evidences legislative approval of the departmental interpretation. Even if the limiting phrase involving acquisition from the decedent was enacted solely to prevent avoidance of the tax, the power to include property acquired by the survivor from the decedent prior to 1916 existed and the plain words of the statute should not be changed in order to eliminate such transactions falling within the general class adopted by Congress to prevent avoidance.

ARGUMENT

I

SECTION 302 (e) AND (h) OF THE REVENUE ACT OF 1926 IS NOT UNCONSTITUTIONAL IN INCLUDING IN A DECEDENT'S GROSS ESTATE THE FULL VALUE OF A JOINT TENANCY CREATED BY CONTRIBUTIONS OF THE DECEDENT PRIOR TO THE REVENUE ACT OF 1916

The various stocks in the joint accounts of the decedent and his wife, the full value of which the Commissioner of Internal Revenue included in the decedent's estate, consisted of stock transferred by the decedent or his wife to the joint accounts prior to the enactment of the Revenue Act of 1916, the first Federal estate tax Act, stock purchased by the decedent and registered in the joint names prior to that Act, and the proceeds of stock dividends or the exercise of stock rights and increases by split-ups which were derived from the stock in the joint accounts prior to the Act (R. 88-89). The petitioner concedes that it was the legislative intent in enact-

ing Section 302 (h) of the Revenue Act of 1926 (Appendix, *infra*, p. 20) to include in a decedent's gross estate the full value of property contributed by the decedent to a joint tenancy before September 9, 1916, the effective date of the 1916 Act; but contends that in so far as the statute includes more than half of such value it is retroactive and unconstitutional. This contention was disapproved by the District Court and the Circuit Court of Appeals in the present case. It has been approved by the Circuit Court of Appeals for the Seventh Circuit in the similar case of *Jacobs v. United States*, 97 F. (2d) 784, pending on writ of certiorari, No. 391, present Term, and assigned for argument immediately before the present case.

The Government's position on this question is set out in full in its brief as petitioner in the *Jacobs* case, to which the Court is respectfully referred in order to avoid needless repetition. Briefly outlined, our position is that in *Tyler v. United States*, 281 U. S. 497, this Court permitted the inclusion in the gross estate of the full value of a tenancy by the entirety on the ground that the death of the one tenant brought into being or ripened for the survivor property rights of such character as to make appropriate the imposition of a tax upon the result; that the decisive similarity between tenancies by the entirety and joint tenancies lies in the right of survivorship, which is present in both cases; that upon the death of one

of the joint tenants and because of it his right of survivorship is extinguished and the survivor for the first time becomes entitled to the exclusive possession, use, and enjoyment of the whole property as his own, and only then becomes assured of the power of disposing of the property by will; and that the death of the one tenant resulting in a shifting of rights with respect to the whole makes appropriate the imposition of an estate tax upon the full value of the joint tenancy no matter when the estate was created.

We contend that the decision of this Court in *Foster v. Commissioner*, 303 U. S. 618, permitting the taxation of the full value of a joint tenancy created after the 1916 Act on the authority of the *Tyler* case and *Gwinn v. Commissioner*, 287 U. S. 224, shows that the taxable occasion is the death of one of the joint tenants, and that since this Court held at the same time in *Helvering v. Bowers*, 303 U. S. 618, solely upon the authority of the *Tyler* case, that the full value of an estate by the entirety created before 1916 may be included in the gross estate, and since the principles of the *Tyler* case apply as well to joint tenancies, the statute constitutionally embraces joint tenancies created prior to 1916.

We urge also that *Knox v. McElligott*, 258 U. S. 546, *Griswold v. Helvering*, 290 U. S. 56, and *Cahn v. United States*, 297 U. S. 691, are not contrary to our position here, since those cases involved only

the construction of a prior statute and did not decide the question whether or not there was a shifting of benefits at death sufficient to support the exercise of legislative power. Furthermore, we contend that *Nichols v. Coolidge*, 274 U. S. 531, *Helvering v. Helmholz*, 296 U. S. 93, and *White v. Poor*, 296 U. S. 98, are not in point since they involved transfers completed prior to the enactment of the statute, leaving nothing to pass at death while here the survivor's rights were not complete until the cotenant's death.

Moreover, this Court, in *Welch v. Henry et al.* (No. 13 Present Term), stated (pamph. pp. 5-6) that the decision in *Nichols v. Coolidge*, *supra*, and similar cases was rested on the ground that the tax could not reasonably have been anticipated when the taxpayer did the voluntary act which the statute later made the taxable event, and since the taxpayer might have refrained from the act had he anticipated the tax, the taxation was so oppressive as to deny due process. In the present case, however, the decedent, after enactment of the tax statute and before his death could have avoided the tax now complained of by severing the joint estate in the shares of stock here involved and by obtaining an exclusive interest in one-half of the property instead of a right to survivorship in the entire property. Certainly, in these circumstances, the tax statute cannot be said to be so oppressive as to deny due process of law.

Accordingly, for the reasons given in the Government's brief in the *Jacobs* case, we contend that Section 302 (e) and (h) is constitutional when construed, as it must be, to include in the decedent's gross estate the death value of all the property contributed to the joint tenancy prior to 1916.

II

THE STATUTE REQUIRES THE INCLUSION IN THE GROSS ESTATE OF THE STOCK GIVEN BY THE DECEDENT TO HIS WIFE AND CONTRIBUTED BY HER TO THE JOINT TENANCY BEFORE THE EFFECTIVE DATE OF THE REVENUE ACT OF 1916

In addition to the stock contributed by the decedent, his wife contributed to the joint tenancy in 1915 and 1916, before the enactment of the Revenue Act of 1916, certain stock the value of which at the date of the decedent's death, including stock split-ups, stock dividends, and stock acquired by the exercise of stock rights, was \$846,772.15. The original stock was first acquired by his wife by gift from the decedent (R. 90, 91). The petitioner contends (Br. 30) that even if Congress could constitutionally have subjected the entire joint estate to the estate tax, the statute was not intended to include the stocks contributed by Mrs. Folger. We submit that the statutory language clearly requires their inclusion and prohibits the construction advanced by the petitioner.

1. Section 302 (e) of the Revenue Act of 1926 (Appendix, *infra*, p. 19) includes in the gross

estate the value of all property, to the extent of the interest therein held as joint tenants—

* * * except such part thereof as may be shown to have originally belonged to such other person [the survivor] and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: * * *

The words "*never to have been received or acquired,*" we think, are susceptible of but one meaning, namely: not ever to have been received or acquired in the manner stated at any point of time, either in the past or in the future.¹ We submit that to interpret this language as referring to an acquisition after a particular point of time does such violence to the ordinary meaning of the words as to be inadmissible under the guise of construction.

The petitioner would treat the section as if it read: "Except such part thereof as may be shown to have originally belonged to such other person [the survivor] and never, after the enactment of the Revenue Act of 1916, to have been received or acquired" from the decedent. So read, we think, the use of the word "never" is so inconsistent with the phrase "after the enactment of the Revenue Act of 1916" that the two cannot stand together. It is possible to construe the phrase "at any time"

¹ This construction adopts the correct and usual meaning of "never". Webster's New International Dictionary, Second Edition, 1938, defines "never" as "1. Not ever; not at any time; at no time, past, present, or future. * * *"

to mean at any time after a certain event, as in the cases cited by the petitioner (Br. 31). But the words "never to have been received or acquired" must refer to every point of time and not to a particular time or event.

2. Another reason suggests itself why the statute should not be construed in accordance with the petitioner's contention. The words "never to have been received or acquired from the decedent" are not a separate limitation on the exemption which may be independently construed but are a part of the whole phrase defining an exemption from the tax. Clearly the words "except such part thereof as may be shown to have originally belonged to such other person" refer to a date before the creation of the joint tenancy because obviously the property must have originally belong to the survivor before it was contributed to the joint estate. In fact the words "never to have been received or acquired" from the decedent must refer to a time coinciding with or antedating the time when the property originally belonged to the survivor. To obtain the exemption the petitioner must contend that the words "originally owned" include the survivor's property in this case originally owned and contributed to the joint estate before the 1916 Act. Consequently, the words "never to have been received or acquired" from the decedent must also include this property originally owned and contributed to the joint estate before 1916.

Conversely stated, if the words just quoted are construed to apply only to an acquisition occurring after the 1916 Act, a like construction must be given to the exemption of property originally belonging to the survivor and which could not have so belonged until after its acquisition, with the result that the exemption would not extend to contributions made by the survivor prior to the Revenue Act of 1916. No such result was, of course, intended.

If, as the petitioner asserts, the portion of the section which refers to the acquisition from the decedent is a limitation on the exemption of property contributed by the survivor, rather than an integral part of the exemption itself, it follows that such portion thereby defines an "interest" subject to the tax. In such event, aside from and in addition to the specific words employed, the intention to include property acquired by gift from the decedent and contributed to the tenancy before 1916 is evidenced by subdivision (h) of Section 302 of the Revenue Act of 1926, *infra*, which makes the provisions of subdivision (e) applicable to interests created, arising, or existing at any time prior to the enactment of the Act.

3. The administrative construction of Section 302 (e) supports the view that the subdivision applies to contributions made by the survivor prior to the Revenue Act of 1916 which were received as gifts from the decedent. The Revenue Acts of 1916 and 1918 excepted such part of the interest "as may be

shown to have originally belonged to such other person [the survivor] and never to have belonged to the decedent." Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 202 (c); Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 402 (d).

The regulations under the 1916 Act provided that "Only such part of such property as can be shown never to have been owned by the decedent can be excluded from his gross estate" (Regulations 37, Art. IV-(3), promulgated as T. D. 2378, Treasury Decisions, Vol. 18, pp. 182, 184); while under the 1918 Act they provided that "The value of such property to be returned for tax is the value of the entire property, unless it can be shown that part of it originally belonged to the other joint owner and never belonged to the decedent" (Regulations 37, Revised, 1919, Art. 28).

The Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 402 (d), excepted such part of the interest—

as may be shown to have originally belonged to such other person [the survivor] and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such

property as is proportionate to the consideration furnished by such other person: * * *

Subsequent Revenue Acts have used the same language, with the exception of the substitution of the words "an adequate and full consideration" for the words "a fair consideration" made in the Revenue Act of 1926. Section 302 (e), Revenue Act of 1924, c. 234, 43 Stat. 253; Section 302 (e), Revenue Act of 1926 (Appendix, *infra*, p. 19).

The regulations under the 1921 Act (Regulations 63, 1922 Edition, Art. 24) provide in part as follows:

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. * * *

Similar language is contained in all subsequent estate tax regulations. See Article 23, Regulations 63; Article 23, Regulations 70 and 80 (Appendix, *infra*, pp. 21). Accordingly, it appears that the Treasury Department has construed the statute as excluding only those contributions of property made by the survivor which at no time in the past had been received as a gift from the decedent.

Under the circumstances, legislative approval of the departmental construction is to be implied. *Brewster v. Gage*, 280 U. S. 327, 336-337; *McFeely v. Commissioner*, 296 U. S. 102, 108; *Mass. Mutual Life Ins. Co. v. United States*, 288 U. S. 269, 272.

The petitioner contends that the limitation on the exemption was enacted solely for the purpose of preventing avoidance of the tax upon joint tenancies through a technical transfer from one to the other, followed immediately by a contribution to a joint tenancy, and that the section is not to be construed to include such contributions made before 1916 when there was no tax to avoid. There is nothing in the statute itself which would show that this was the sole purpose of the enactment. It may as well be assumed that in laying hold of joint estates because they accomplish the result of transferring property from a decedent to his joint tenant, Congress intended to include all property coming into the tenancy, mediately as well as immediately, from the decedent. There would be no lack of power so to tax if, as we have contended under Point I herein, the death of one joint tenant results in the shifting of substantial rights with respect to the whole property.

But even if the limitation was enacted solely to prevent avoidance, statutory language as clear as that contained in Section 302 (e) and similar provisions of prior Acts should not be distorted in order to except cases in which there was no intention to avoid the tax. If Congress has determined

that the statutory provision in question was necessary to prevent avoidance there is no occasion to inquire in a particular case whether there was really a purpose to avoid the tax. It is evident that the statute did not intend to require the Government to establish that a preliminary gift was in fact made as a device to avoid the tax. If Congress has determined that transactions of a particular character must be included to make the tax effective, it is competent and, we submit, not unusual, to provide that all such transactions should be included without inquiring in each case whether the particular gift was made for the purpose of tax avoidance. It would be sufficient, if necessary to sustain such a statute, that preliminary gifts are potentially capable of producing tax avoidance, and it is owing to the possibility that transactions of that kind will reduce the effectiveness of the statute, that Congress may bring them within the statutory scope. Cf. *Silz v. Hesterberg*, 211 U. S. 31, 40. The existence of such a power is not to be denied merely because some innocent transactions may be found in a specified class. *Purity Extract Co. v. Lynch*, 226 U. S. 192, 204. And where, as here, the power exists even apart from the right to prevent avoidance, the plain meaning of the statute should not be changed in order to eliminate some transactions within a general class embracing gifts which would actually avoid the tax.

Congress has the power to include such prior gifts and has exercised it in plain and compelling

language. There is no reason for reading into the statute an exception which Congress has nowhere indicated.

CONCLUSION

The court below correctly held that there was no lack of power to include in the gross estate the full value of a joint tenancy created before the Revenue Act of 1916, and that the statute intended to include in the decedent's estate the value of property acquired by the survivor by gift from the decedent and contributed to the tenancy before the enactment of that Act. Its decision should be affirmed.

Respectfully submitted.

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JANUARY 1939.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 70:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so

acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * *

[U. S. C., Title 26, Sec. 411.]

Treasury Regulations 70 (1926 Ed.), promulgated as T. D. 3918 (Treasury Decisions, Volume 28, pp. 427, 453) under the Revenue Act of 1926:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivor-

ship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. (2) Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by

the other joint owner from the decedent as a gift, or for less than an adequate and full consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants by the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) Where the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the pur-

chase price of the property, the entire value of the property should be included; (d) where the other joint owner, prior to the acquirement of the property, received from the decedent, for less than an adequate and full consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Treasury Decision 4248, VII-2 Cumulative Bulletin 358 (1928):

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

"The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916."

Treasury Regulations 70 (1929 Ed.), promulgated under the Revenue Act of 1926 as amended and supplemented by the Revenue Act of 1928:

ART. 22. Property held jointly or as tenants by the entirety.—The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916. The statute specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and

spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. [This is the same as Article 23 of Regulations 70 (1926 Ed.) above quoted.]

Treasury Decision 4295, IX-2 Cumulative Bulletin 426 (1930):

Article 22 of Regulations 70 (1929 edition) is hereby amended by substituting in lieu of the first sentence thereof the following:

"The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created."

Treasury Regulations 80 (1934 Ed.), promulgated under the Revenue Acts of 1926 and 1932 as amended:

ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. The statute specifically

reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. This section of the statute applies to all classes of property, whether real or personal, in the case the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

[Article 23 of these Regulations is substantially the same as Article 23 of Regulations 70 (1926 Ed.) above quoted and will not be repeated here.]

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